MOTION FILED

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In the

# SUPREME COURT OF THE UNITED STATES

[redacted] BER TERM, 1965

No. [redacted] Miscellaneous

HONORABLE STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma,
*Petitioner,*

VERSUS

JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES,
*Respondent.*

## MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS, AND PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS

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January ____, 1966

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In the
Supreme Court of the United States

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OCTOBER TERM, 1965

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No. ....., Miscellaneous

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HONORABLE STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma,
*Petitioner,*

VERSUS

JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES,
*Respondent.*

---

**MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS, AND PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS**

---

**MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS**

The petitioner moves the Court for leave to file the annexed petition for writ of prohibition and/or mandamus under Section 1651 of Title 28, United States Code, directed against the Judicial Council of the Tenth Circuit of the United States restraining it from exceeding its jurisdictional powers in issuing an Order stripping the petitioner of his power and authority to try or otherwise take action in

cases and proceedings filed or instituted in the United States District Court for the Western District of Oklahoma, and directing the vacation of such Order, and for such other and further relief as may be proper.

THOMAS J. KENAN

*Counsel for Petitioner*

January, 1966

# In the
# Supreme Court of the United States

OCTOBER TERM, 1965

**No. ....., Miscellaneous**

HONORABLE STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma,
*Petitioner,*

VERSUS

JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES,
*Respondent.*

**PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS RESTRAINING THE RESPONDENT, THE JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES, FROM EXCEEDING ITS JURISDICTIONAL POWERS IN ISSUING AN ORDER STRIPPING THE PETITIONER OF HIS POWER AND AUTHORITY TO TRY OR OTHERWISE TAKE ACTION IN CASES AND PROCEEDINGS FILED OR INSTITUTED IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, AND DIRECTING THE VACATION OF SUCH ORDER**

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Petitioner prays that a writ of prohibition and/or mandamus issue to restrain the resopndent from exceeding its jurisdictional power in ordering that, until its further

order, the petitioner shall take no action whatsoever in any case or proceeding now or hereafter pending in the United States District Court for the Western District of Oklahoma, that all cases and proceedings then assigned to or pending before him shall be reassigned to and among the other judges of said Court, and that until the further order of respondent no cases or proceedings filed or initiated in said Court shall be assigned to him for any action whatsoever; and petitioner further prays that said writ issue to direct the vacation of such order.

## OPINION BELOW

The opinion of the respondent, the Judicial Council of the Tenth Circuit of the United States, is not reported but is contained in its Order *In the Matter of the Honorable Stephen S. Chandler, United States District Judge for the Western District of Oklahoma,* Special Session, December, 1965. The Order is printed as Exhibit A of the Appendix.

## JURISDICTION

The respondent's Order was made on December 13, 1965, filed in the United States Court of Appeals for the Tenth Circuit, on December 27, 1965, and served on petitioner and filed in the United States District Court for the Western District of Oklahoma on December 28, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1651(a), and under the Court's inherent powers.

The following decisions, interpreting the more limited common law writ jurisdiction of this Court which existed

before the Act of June 25, 1948, 62 Stat. 944, are strengthened by that enactment and sustain the power and jurisdiction of the Court to issue the desired writ:

—*United States Alkali Export Ass'n Inc.* v. *United States*, 325 U.S. 196 (1945);

*DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212 (1945).

The special and unusual circumstances which warrant exercise by this Court of its discretionary power to issue a writ of prohibition and/or mandamus, as requested in this petition, are set forth later under the heading "Reasons for Granting the Writ" (infra, pp. 12-14).

## QUESTIONS PRESENTED

1. When a Judicial Council orders a federal district judge to take no action whatsoever in any case or proceeding then or thereafter pending in the federal district judge's court, has the Judicial Council exceeded its jurisdictional authority as conferred by 28 U.S.C. § 332?

2. When a Judicial Council acts to strip from a federal district judge all of his power and authority to try or otherwise take action in cases or proceedings then or thereafter pending in his court, has the Judicial Council exceeded the constitutional powers inhering in the Judiciary and infringed upon the powers of the Congress relating to impeachment of officers of the Federal Government, as set forth in Article I, Section 2, clause 5; in Article I, Section 3, clauses 6 and 7; and in Article III, Section 1?

3. When a Judicial Council's order, stating a federal district judge is either unable or unwilling to discharge efficiently the duties of his office and withdrawing from him his right to hear and take action in cases or proceedings then or thereafter pending in his court, is issued after a secret meeting affording the judge neither notice nor opportunity to hear or challenge the matters discussed or to present evidence in his own behalf and defense, or to be represented by counsel, has the Judicial Council afforded the federal district judge the protection guaranteed by the due process clause of Amendment V to the Constitution of the United States?

4. If a Judicial Council is enabled by 28 U.S.C. § 332 to strip a federal district judge of his power and authority to act in all cases and proceedings then or thereafter before his court, was it a sound exercise of discretion by the Judicial Council of the Tenth Circuit to do so in the circumstances of the present case? More particularly, can such drastic action by a Judicial Council be grounded upon the fact that a federal district judge has been named a party defendant in civil and criminal litigation during the last four years, even though there was no culpability, and because two proceedings have been brought in a court of appeals to disqualify him from handling specific litigation?

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are as follows:

1. Article I, Section 2, clause 5

The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.

2. Article I, Section 3, clauses 6 and 7

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath of Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

3. Article III, Section 1

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

4. Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

---

The statutes involved are as follows:

1. 28 U.S.C., § 1651(a), 62 Stat. 944, amended May 24, 1949, c. 139, § 90, 63 Stat. 102

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

2. 28 U.S.C., 1940 ed., § 377, 36 Stat. 1162

The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit court of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

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3. 28 U.S.C., § 332, 62 Stat. 902

4. 28 U.S.C., 1940 ed., § 448 (Mar. 3, 1911, c. 231, § 306, as added Aug. 7, 1939, c. 501, § 1, 53 Stat. 1223

The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit judges for the circuit, in active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall attend all sessions of the council.

The council shall be known as the Judicial Council of the circuit.

The chief judge shall submit to the council the quarterly reports of the Director of the Administrative Office of the United States Courts. The Council shall take such action thereon as may be necessary.

Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.

To the end that the work of the district courts shall be effectively and expeditiously transacted, it shall be the duty of the senior circuit judge of each circuit to call at such time and place as he shall designate, but at least twice in each year, a council composed of the circuit judges for such circuit, who are hereby designated a council for that purpose, at which council the senior circuit judge shall preside. The senior circuit judge shall submit to the council the quarterly reports of the Director required to be filed by the provisions of section 304, clause (2), and such action shall be taken thereon by the council as may be necessary. It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts. Nothing contained in this section shall affect the provisions of existing law relating to the assignment of district judges to serve outside of the districts for which they, respectively, were appointed.

5. 28 U.S.C., § 372, as amended Feb. 10, 1954, 68 Stat. 13, and Sept. 2, 1957, 71 Stat. 586

See Exhibit B of the Appendix.

6. 28 U.S.C., § 136(d) and (e), 62 Stat. 897

See Exhibit B of the Appendix.

7. 28 U.S.C., § 137, 62 Stat. 897

See Exhibit B of the Appendix.

## STATEMENT OF THE CASE

On December 13, 1965, the Judicial Council of the Tenth Circuit of the United States met in special session at Denver, Colorado.

The purpose of the special session, according to an Order (Exhibit A of the Appendix) made at the Session, was to review the effect of Chief Judge Stephen Chandler on the business of the United States District Court for the Western District of Oklahoma.

Judge Chandler was given no notice of the calling of the Special Session or of its purpose. He was given no opportunity to be present during the deliberations of the Special Session, no opportunity to hear the nature of any complaint about him, no opportunity to rebut complaints, cross-examine accusers, or present explanations or evidence in his own behalf, and no opportunity to be represented at the Special Session by counsel.

The Judicial Council, at its special session, made an Order (Exhibit A of the Appendix) finding that Judge

Chandler was presently unable or unwilling to discharge efficiently the duties of his office. The Order stated that, until the further order of the Judicial Council, Judge Chandler was stripped of his power and authority to hear and decide cases or take any action whatsoever in all cases or proceedings then or thereafter pending in his Court.

The Order cited, as specific reasons justifying this finding and Order, that during the past four years Judge Chandler had been a party defendant in both civil and criminal litigation, of which one civil case was still pending, and that two proceedings had been brought in a United States Court of Appeals to disqualify Judge Chandler from handling specific litigation, in one of which proceedings he was ordered to proceed no further and in the other proceeding the matter was still pending.

Other than these specific reasons, nothing was cited to justify the Order except a vague reference to "the entire situation" and to "the attitude and conduct of Judge Chandler" as they affect the business of his Court.

The Order was not filed, made public or its terms made known to Judge Chandler for two weeks, although rumors of the entry of a punitive order circulated. It was finally filed in the United States Court of Appeals for the Tenth Circuit on December 27, 1965, and in the United States District Court for the Western District of Oklahoma on December 28, 1965. Four of the five Judicial Council judges present at the December 13 Special Session signed the Order.

The unprecedented Order created a sensation in the press and evoked considerable commentary by newspaper editors, television reporters and commentators, Members

of Congress, and members of the bar (Exhibit C of the Appendix). Much of this commentary, particularly that in the major newspapers of Judge Chandler's State of Oklahoma severely damaged his prestige, standing, and reputation, in that it quite naturally assumed that Judge Chandler must be derelict in the discharge of his duties as a federal district judge.

## REASONS FOR GRANTING THE WRIT

1. Relief is available in no other Court in the land. Title 28, Chapters 81 and 83, United States Code, does not specifically confer on this Court or any Court of Appeals of the United States jurisdiction to hear an appeal from a Judicial Council. However, relief to Judge Chandler can come through the extraordinary writs, provided to the Supreme Court and to all courts established by Act of Congress, as set forth in 28 U.S.C. § 1651(a), or through the inherent powers of this Court. Since the Judicial Council of the Tenth Circuit has as its members the Circuit Judges for the Circuit, it would be a futile gesture to petition the Court of Appeals for the Tenth Circuit for relief under 28 U.S.C. § 1651(a).

Ample authority for the Supreme Court to invoke jurisdiction is provided in 28 U.S.C. § 1651(a). Prior to the enactment of the Act of June 25, 1948, c. 646, 62 Stat. 944, there may have been question whether the extraordinary relief prayed for in this petition could be issued by this Court. 28 U.S.C., 1940 ed., § 377, 36 Stat. 1162, provided authority to this Court only to issue all writs *necessary for the exercise of its respective jurisdiction.* See *Ex parte Republic of Peru,* 318 U.S. 578 (1943).

In the Act of June 25, 1948, 62 Stat. 944, the Congress broadened the authority of this Court to issue writs of prohibition and mandamus. 28 U.S.C. § 1651(a) now provides authority to this Court not only to issue all writs *necessary* to its jurisdiction, as of old, but also all writs *appropriate in aid of* its jurisdiction.

Since Judge Chandler sits as a court of first instance—the fact finding court—in cases over which this Court has appellate and review jurisdiction, it would seem no stronger instance could be cited for issuing a writ either "necessary" or "appropriate in aid of" this Court's jurisdiction than the present, which touches, through Judge Chandler's fate, hundreds of cases over which this Court has appellate or review jurisdiction.

2. The writ should be issued because a question of immense public importance is involved and it is peculiarly appropriate that action by this Court should be taken.

Clearly, this revolutionary action of the Judicial Council of the Tenth Circuit is of enormous significance not only to the federal judiciary but to all Americans. The fabric of our political life, the Constitution of the United States, is placed under stress by this Judicial Council action which is equivalent in many ways to an impeachment of a federal judge.

The public importance of the Judicial Council's Order and its implications are evidenced by the widespread interest in this entire matter, of which this Court knows and can take judicial notice and evidence of which is presented in Exhibit C of the Appendix.

3. The writ prayed for should be issued because it is the only expeditious and effective means of confining the Judicial Council of the Tenth Circuit to a lawful exercise of its functions as prescribed by 28 U.S.C. § 332. This is not an instance of mere error but of usurpation of power. There is urgent business before Judge Chandler's court, and he can serve the litigants of the district only if this Court removes the Order creating confusion in his court by purporting to rob him of his authority and power, in effect, his office.

4. The writ prayed for should be issued in order to preserve Judge Chandler's constitutional rights of due process of law, set forth in Amendment V of the Constitution of the United States, and denied him in the Star Chamber proceeding of the Judicial Council on December 13, 1965. All citizens are entitled to due process of law, but there is an immense public interest in the preservation of this standard as it respects the manner in which a Judicial Council cracks the whip over a federal district judge and eviscerates him of his judicial powers.

## ARGUMENT

The Judicial Council of the Tenth Circuit had no jurisdiction to strip Judge Chandler of his powers to act in cases or proceedings then or thereafter pending in his court. The Judicial Council cited, as the source of its power and authority to so act, the Act of June 25, 1948, 62 Stat. 902, 28 U.S.C. § 332. But the legislative history of this Act reveals clearly that the Congress never intended to endow Judicial Councils with such despotic powers over their judicial brethern.

It should initially be noted that the Act of June 25, 1948, 62 Stat. 902 was only a revision of Title 28, United States Code, was not intended to change the law existing then but only to organize it better to eliminate obsolete or revoked statutes, and to clarify any awkwardly expressed but understood intentions. House Report No. 308, 80th Congress.

The true legislative history of 28 U.S.C. § 332 is that of the Act of August 7, 1939, 53 Stat. 1223, which had as its purpose the establishment of the Administrative Office of the United States Courts and contained in its Section 306 the forerunner of today's 28 U.S.C. § 332.

The report of the Senate Committee on the Judiciary, Senate Report No. 426, 76th Congress, which accompanied the 1939 legislation, clearly shows that its main purpose was to transfer from the Attorney General to a newly created Administrative Office of the United States Court the burden of administration over every petty detail affecting the federal courts and that its second purpose was to provide administrative machinery whereby the lagging work of the courts could be expedited and kept up to date.

Senate Report No. 426, 76th Congress, and Section 306 of the Act of August 7, 1939, c. 501, 53 Stat. 1223, both tie the work of the Judicial Councils to the data-collecting and statistics-compiling duties of the Administrative Office of the United States Courts, and they tie the directive power of the Judicial Councils over district judges to the correction of the delays and the administrative criticisms revealed in the quarterly reports of the Administrative Office.

This is far from the tyrannical powers the respondent arrogated to itself when it issued its purported Order against Judge Chandler.

It should further be noted that when the revisory legislation of 1948 was enacted, the revisers drastically altered the order of thoughts in 28 U.S.C., 1940 ed., § 448, relating to Judicial Councils, and the resulting section, today's 28 U.S.C. § 332, might appear to support plenary disciplinary powers over federal district judges by Judicial Councils (compare statutes, *infra,* pp. 8 and 9). However, the pertinent reviser's note revealed to Members of Congress voting on this revisory legislation only that "changes in phraseology were made" to 28 U.S.C., 1940 ed., § 448. House Report No. 308, 80th Congress. Surely, this lack of notice to the Congress of important restructuring of statutory language could not be the basis for altering the original congressional intention expressed in 1939, which intention by no stretch of the imagination embraced authority for the summary stripping of federal district judges' judicial powers by Judicial Councils.

The Judicial Council of the Tenth Circuit has clearly acted beyond the jurisdictional power given it by its creator, the Congress of the United States, as evidenced by a reading of the legislative history of 28 U.S.C., § 332.

In addition, the Judicial Council has broken through the jurisdictional boundaries imposed upon the entire Judiciary by the Constitution and has penetrated deeply into the constitutional powers of the Congress.

Article I, Section 2, clause 5; and Article I, Section 3, clauses 6 and 7 of the Constitution confer upon the Congress

the sole power of impeaching and trying federal officers for misbehavior. And Article III, Section 1 of the Constitution redoubles and focuses this congressional power in the instance of federal judges by guaranteeing that they shall hold their offices during good behavior. Impeachment by the Congress is the only way to strip a federal district judge of his office.

The Judicial Council, by its Order, has stripped Judge Chandler of his judicial authority and powers and left him only the shell of his office. The Constitution can not be so easily subverted. The office of a federal district judge is not his office space, his desk, his robe hanging in a closet. The judicial powers—the authority to take action in cases and proceedings in his court—are a judge's office. The Judicial Council has removed Judge Chandler's office from him, and it thereby transgressed the impeachment powers of the Congress and deprived Judge Chandler of his Constitutional rights under Article III, Section 1.

Judge Chandler was deprived of other constitutional rights, those guaranteed every citizen by the due process of law clause of Amendment V to the Constitution. He was deprived of liberty and property by secret and summary procedures so shocking that they recall those of the British Star Chamber.

He received no notice of the Judicial Council's special session, was not advised of the nature of the charges or complaints made against him, was not allowed to be present at the meeting, was not allowed to confront and cross-examine his discreditors, if any, was not permitted to present a defense or to be represented by counsel. The Order

which issued from this proceeding attempts to reduce and confine Judge Chandler to a federal judge in name only. It cracks the whip and tells him what he can and cannot do. It attempts to take from him the meaning and worth and powers of his office.

This Court has held that government employment in the Executive Branch is not property within the protection of this clause of Amendment V of the Constitution. *Bailey* v. *Richardson,* 182 F.2d 46 (1950), *affirmed* 341 U.S. 918. But Judge Chandler neither is an employee nor has he been removed from office. He, as a *person,* still holds his office, and attempts to deprive him of the liberties and properties of that office—its powers and authorities—must surely meet the minimum standards of due process set forth in Amendment V to the Constitution. As a constitutional minimum, in the absence of explicit authorization from the Congress, the Judicial Council could not deprive Judge Chandler of the worth of his office in a proceeding that does not afford him rudimentary due process. See *Greene* v. *McElroy,* 360 U.S. 474 (1959).

Finally, if this Court should find that Judicial Councils are entitled under the Constitution and the enactments of the Congress to summarily strip federal district judges of their judicial powers, it is wholly unfitting that the basis for such could be that set forth in the respondent's Order.

Of what significance is it that Judge Chandler was unfortunate enough to be a defendant in civil and criminal actions? Any person can be hauled into court as a defendant. The criterion is culpability.

In the criminal action referred to by the Judicial Council, a misdemeanor action, the Oklahoma State District Judge found that the evidence presented to the Grand Jury was insufficient to show that a crime had been committed, that no crime has been committed by Judge Chandler, and he sustained a Motion to Quash the Indictment. (Exhibit D of the Appendix.)

It is inconceivable that this could in any way justify the removal of Judge Chandler's powers. Yet respondent mentioned this criminal action as supporting its Order.

Judge Chandler has been named a defendant in two civil actions, both brought by the same plaintiff, a lawyer disbarred by both Judge Chandler and the Supreme Court of Oklahoma. Both actions were defamation actions arising out of Judge Chandler's official action. The first was decided in favor of Judge Chandler and affirmed on appeal by the Court of Appeals for the Tenth Circuit. *O'Bryan* v. *Chandler,* U. S. District Court for the Western District of Oklahoma, No. 63-339, decided July 1, 1964, *affirmed* — F.2d — (10th Cir., 1965) (Exhibit E of the Appendix). The second civil action was filed December 8, 1965, in a state court and involves generally the same matter as was presented in the first civil action. Defendant Judge Chandler has until January 7, 1966, to answer the plaintiff in the State Court.

The two disqualification proceedings brought in the Court of Appeals for the Tenth Circuit are *Occidental Petroleum Corporation* v. *Hon. Stephen S. Chandler, United States District Judge for the Western District of Oklahoma,* 303 F.2d 55 (10th Cir., 1962), *cert. denied* 372 U.S. 915

(1963), in which litigation Judge Chandler was disqualified, and *Texaco, Inc.* v. *Hon. Stephen S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma,* No. 8216, — F.2d —, (10th Cir., 1965) (Exhibit F of the Appendix), decided December 27, 1965, unfavorable to Judge Chandler, who is now preparing to petition this Court for an appropriate writ. In both proceedings, petitioner believes the Court of Appeals had no more jurisdiction to act than did the Judicial Council in issuing its Order removing him from all cases, present and future.

Yet these two strange disqualification proceedings, together with an exoneration of misdemeanor charges in a criminal action and a successful defense in a civil action which the defeated plaintiff is attempting to resume, are made the basis by the Judicial Council of peremptorily disqualifying Judge Chandler from acting in any and all proceedings, now or hereafter, in his court.

It is a monstrous violation of traditional American concepts of justice that a person's successful defense in civil or criminal actions should be cited by a judicial body as proof of his unfitness. It is manifestly improper that two specific disqualification instances in over twenty-two years on the bench could provide alone the basis for stripping Judge Chandler of his powers. Whatever policing powers Judicial Councils may have over federal district judges, an attempt to stretch them to the extent of the instant case for the cited reasons is so unwarranted, astonishing and excessive that this Court must act summarily to counter their effect.

## CONCLUSION

For the foregoing reasons, this petition for a writ of prohibition and/or mandamus should be granted.

Respectfully submitted,

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# APPENDIX

## EXHIBIT A

FILED
DEC 28 1965
VERA L. HOWARD
Clerk, U. S. District Court
By Josephine P. Gore
Deputy

DUPLICATE ORIGINAL

FILED
United States Court of Appeals
Tenth Circuit
DEC 27 1965
Robert B. Cartwright
Clerk

IN THE JUDICIAL COUNCIL OF THE TENTH CIRCUIT
OF THE UNITED STATES

SPECIAL SESSION - DECEMBER, 1965

IN THE MATTER OF THE HONORABLE )
STEPHEN S. CHANDLER, UNITED )
STATES DISTRICT JUDGE FOR THE )
WESTERN DISTRICT OF OKLAHOMA )

ORDER

The Judicial Council of the Tenth Judicial Circuit of the United States met in special session at Denver, Colorado, on December 13, 1965. Council members present were:

Judge John C. Pickett
Judge David T. Lewis
Judge Jean S. Breitenstein
Judge Delmas C. Hill
Judge Oliver Seth

[APPENDIX]

Absent from the meeting was Chief Judge Alfred P. Murrah who did not attend because he had previously disqualified himself from participating in proceedings relating to the Honorable Stephen S. Chandler, United States District Judge for the Western District of Oklahoma.

In the past four years the Judicial Council at many meetings has discussed and considered the business of the United States District Court for the Western District of Oklahoma and has done so with particular regard to the effect thereon of the attitude and conduct of Judge Chandler who, as the Chief Judge of that District, is primarily responsible for the administration of such business. During that period Judge Chandler has been a party defendant in both civil and criminal litigation. One civil case is still pending. Two proceedings have been brought in the United States Court of Appeals for the Tenth Circuit to disqualify him from handling specific litigation. In one instance he was ordered to proceed no further and the other is still pending.

From a review of the entire situation pertaining to Judge Chandler the Judicial Council finds that Judge Chandler is presently unable, or unwilling, to discharge efficiently the duties of his office; that a change must be made in the division of business and the assignment of cases in the Western District of Oklahoma; and that the effective and expeditious administration of the business of the United States District Court for the Western District of Oklahoma requires the orders herein made.

Accordingly, pursuant to the power and authority vested in the Judicial Council by the Act of June 25, 1948, c. 646, § 332, 62 Stat. 902, 28 U.S.C. § 332, it is ORDERED that until the further order of the Judicial Council, the Honorable Stephen S. Chandler shall take no action whatsoever in any case or proceeding now or hereafter pending in the United States District Court for the Western District of Oklahoma; that all cases and proceedings now as-

signed to or pending before him shall be reassigned to and among the other judges of said court; and that until the further order of the Judicial Council no cases or proceedings filed or instituted in the United States District Court for the Western District of Oklahoma shall be assigned to him for any action whatsoever.

It is further ORDERED that in the event the active judges of the United States District Court for the Western District of Oklahoma, including Judge Chandler, cannot agree among themselves upon the division of business and assignment of cases made necessary by this order, the Judicial Council, upon such disagreement being brought to its attention, will act under 28 U.S.C. § 137 and make such division and assignment as it deems proper.

An original copy of this order shall be retained in the records of the Judicial Council. A duplicate original shall be forthwith transmitted to the Clerk of the United States District Court for the Western District of Oklahoma. A copy hereof, properly certified by the secretary of the Judicial Council, shall be sent to the United States Marshal for the Western District of Oklahoma for service by him or his deputy on the Honorable Stephen S. Chandler. The Marshal, or his deputy, making such service shall make and file with the secretary of the Judicial Council a return showing the place and time of such service.

Done by the Judicial Council of the Tenth Circuit at Denver, Colorado, this 13 day of December, 1965.

/s/ John C. Pickett
Circuit Judge
/s/ Jean S. Breitenstein
Circuit Judge
/s/ Delmas C. Hill
Circuit Judge
/s/ Oliver Seth
Circuit Judge

## EXHIBIT B

28 U.S.C. § 372, as amended Feb. 10, 1954, 68 Stat. 13 and Sept. 2, 71 Stat. 586.

"(a) Any justice or judge of the United States appointed to hold office during good behavior who becomes permanently disabled from performing his duties may retire from regular active service, and the President shall, by and with the advice and consent of the Senate, appoint a successor.

"Any justice or judge of the United States desiring to retire under this section shall certify to the President his disability in writing.

"Whenever an associate justice of the Supreme Court, a chief judge of a circuit or the chief judge of the Court of Claims, Court of Customs and Patent Appeals, or Customs Court, desires to retire under this section, he shall furnish to the President a certificate of disability signed by the Chief Justice of the United States.

"A circuit or district judge, desiring to retire under this section, shall furnish to the President a certificate of disability signed by the chief judge of his circuit.

"A judge of the Court of Claims, Court of Customs and Patent Appeals, or Customs Court desiring to retire under this section, shall furnish to the President a certificate of disability signed by the chief judge of his court.

"Each justice or judge retiring under this section after serving ten years continuously or otherwise shall, during the remainder of his lifetime, receive the salary of the office. A justice or judge retiring under this section who has served less than ten years in all shall, during the remainder of his lifetime, receive one-half the salary of the office.

"(b) Whenever any judge of the United States appointed to hold office during good behavior who is eligible to retire under this section does not do so and a certificate of his disability signed by a majority of the members of the Judicial Council, of his circuit in the case of a circuit or district judge, or by the Chief Justice of the United States in the case of the Chief Judge of the Court of Claims, Court of Customs and Patent Appeals, or Customs Court, or by the chief judge of his court in the case of a judge of the Court of Claims, Court of Customs and Patent Appeals, or Customs Court, is presented to the President and the President finds that such judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability and that the appointment of an additional judge is necessary for the efficient dispatch of business, the President may make such appointment by and with the advice and consent of the Senate. Whenever any such additional judge is appointed, the vacancy subsequently caused by the death, resignation, or retirement of the disabled judge shall not be filled. Any judge whose disability causes the appointment of an additional judge shall, for purpose of precedence, service as chief judge, or temporary performance of the duties of that office, be treated as junior in commission to the other judges of the circuit, district, or court."

28 U.S.C. § 136 (d) and (e), 62 Stat. 897.

"(d) If the chief judge desires to be relieved of his duties as chief judge while retaining his active status as district judge, he may so certify to the Chief Justice of the United States, and thereafter the district judge in active service next in precedence and willing to serve shall be designated by the Chief Justice as the chief judge of the district court.

"(e) If a chief judge is temporarily unable to perform his duties as such, they shall be performed by the dis-

trict judge in active service, present in the district and able and qualified to act, who is next in precedent."

28 U.S.C. § 137, 62 Stat. 897.

"The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.

"The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.

"If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders."

EXHIBIT C

**The Oklahoma Journal**

Oklahoma City, Oklahoma Tuesday, December 28, 1965

# CHANDLER'S JUDICIAL POWERS STRIPPED, SOURCES REPORT

## Judge To Get Orders Today

By BABS FENWICK

U. S. District Judge Stephen S. Chandler has been stripped of his judicial powers in a secret order issued by the 10th Circuit Judicial Council, sources said Monday.

The order is expected to be filed in Oklahoma City's U.S. district court clerk's office Tuesday, thus becoming public record.

Sources said the council last week issued Chandler an ultimatum either to retire or to have his entire caseload taken from him.

COUNCIL MEMBERS, who also make up the 10th Circuit Court of Appeals in Denver, Monday formally removed the 65-year-old judge from hearing the $25 million Hirshfield vs. Texaco case.

Removing Chandler from hearing any and all cases in the Western District of Oklahoma is an unprecedented council order, sources said.

One source indicated the order also may limit his powers as chief judge of the district.

"This is an extremely harsh position for them to take—a blanket order taking every case away from him," the source said.

"But if they've got the power to take his cases, they've got the power to reduce his authority as chief judge, too."

After last week's ultimatum to Chandler to resign or

be stripped of powers, one source said the judge considered retirement if allowed to name his successor.

THE CONTROVERSIAL chief judge reportedly sent a prominent Oklahoma City attorney to Washington last week to confer with U.S. Sen. A. S. Mike Monroney.

Monroney would name the new judge if a vacancy occurred.

Chandler reportedly sent word to Monroney he would retire if a specific Oklahoma County district judge was named to the lifetime, $30,000-a-year federal post.

Monroney refused.

Chandler is known to have counseled with several prominent attorneys on whether he should retire or fight the council's order.

ONE ATTORNEY SAID Chandler has several recourses. He may file an application before the U.S. Supreme Court asking the high court to prohibit the council from enforcing the order.

Or, the judge can take the issue to the U.S. Congress. "Congress has the sole power of impeachment," a source said, "and the effect of taking his cases away is so monumental, that the order may be encroaching on congressional powers."

The judiciál council order was reportedly issued Friday. However, the order does not become public record until filed with the district court it affects.

One source indicated the order might be more encompassing than expected. He said the council, to force Chandler's retirement, could recommend he be made a junior judge, similar to the procedure used for U.S. District Judge Ross Rizley.

EARLIER THIS YEAR, the council recommended to President Johnson that Rizley be certified as physically disabled and that a new judgship post be created. It was filled by Judge Luther Eubanks.

By statute, the council may recommend that the powers of a judge be reduced or taken on by another judge on grounds of physical or mental disability or moral turpitude.

Several attorneys close to Chandler indicated they

question the council's authority to issue a blanket order excluding a judge from hearing all cases.

Law provides that the council, which has general superintending powers over 10th Circuit district court judges, may take whatever action necessary for the proper administration of justice.

SOURCES CLOSE to Chandler indicate the judge will not retire. He has been on the federal bench 22 years and has been eligible for retirement at full pay for 12 years. The law allows him to remain as chief judge until the age of 70—five years from now.

The council's order is only one of several controversies that has hit the federal judge this year.

Attorneys for Texaco asked and got Monday the circuit court to disqualify Chandler from hearing the case on the grounds that one of the lawyers involved worked for him last year.

The order disqualifying Chandler, entered Monday, said that presiding Circuit Court Judge A. P. Murrah would be empowered to appoint another judge to the Hirshfield vs. Texaco case.

The Oklahoma Journal, Tuesday, December 28, 1965

## Chandler

(Continued From Page 1)

MURRAH SAID IT would be next week before he designated a new judge. It was not known if the case would be assigned to one of the other Oklahoma City federal judges or an out-of-state judge in the 10th Circuit.

Murrah, who presides over the court and the council, disqualified himself from hearing the Chandler matters. The order taking the Texaco case from Chandler was concurred in by Judges Lewis, Pickett, Breitenstein, Seth and Hill.

All five are council members.

—x—

[APPENDIX]

TULSA DAILY WORLD

Thursday, December 30, 1965

## Lesson For Reformers

ANOTHER sad chapter has been added to Oklahoma's record of judicial misadventure in 1965. Federal District JUDGE STEPHEN S. CHANDLER has been stripped of his duties and powers by the Judicial Council of the 10th Circuit Court of Appeals.

This unusual action is not related to the earlier round of troubles on the bench in Oklahoma, which involved three former Justices of the State State Supreme Court. But it accentuates one problem common to both Federal and State courts—how to remove judges from active duty when they are either unable or unwilling to carry out their responsibilities.

In the case of JUDGE CHANDLER, the Judicial Council has taken the action it deems necessary. But the State has no such machinery, short of impeachment.

After the succession of troubles rising out of our courtrooms in the past year, it is little wonder that judicial reform shapes up as the most talked-about issue in the forthcoming Governors race—and it is bound to come before the 1967 Legislature.

When reforms are discussed or written into law, it is important to find the best possible method of selecting Judges. But some attention also must be given to a means of removing Judges, for either incompetence or disability, in addition to the present cumbersome impeachment procedure.

Even the Federal program does not seem adequate. If JUDGE CHANDLER cannot function as a Judge, we see little reason for him to retain a staff or to occupy a place on the roster of active Judges. It would be

better for him to be retired and replaced by a new appointee able to take his share of the District Court responsibilities. It would be helpful if CHANDLER would take retirement on his own.

The CHANDLER case also serves to remind us that mere appointment of Judges is no automatic guarantee of a trouble-free bench. All Federal Judges are appointed by the PRESIDENT, usually on recommendation by one or more U.S. Senators.

The sober fact is that there is no method of selecting Judges that comes with any kind of guarantee. The human factor, if nothing else, would make that impossible.

What the State of Oklahoma must do is keep an open mind, search painstakingly for the best-proven system of selecting Judges and move quickly to carry it out. And the system ought to include machinery for removal as well.

## EXHIBIT D

FILED, DISTRICT
COURT, OKLAHOMA
COUNTY, OKLA.
Dec. 9, 8:17 A.M., '65
DALE SMITH
Court Clerk
By (Name illegible)
Deputy

IN THE DISTRICT COURT IN AND FOR OKLAHOMA COUNTY,
STATE OF OKLAHOMA

| | | |
|---|---|---|
| THE STATE OF OKLAHOMA, Plaintiff, | ) | |
| -VS- | ) | |
| | ) | No. 31299 |
| STEPHEN CHANDLER and EDWIN LEE KESSLER, Defendants. | ) | |

### ORDER

This matter comes on for hearing on the 22nd day of November, 1965, before the undersigned District Judge, duly assigned by the Chief Justice of The Supreme Court of the State of Oklahoma to hear said cause; the State of Oklahoma appearing by and through D. K. Cunningham, Assistant County Attorney; the defendant, Stephen Chandler, appearing in person and by and through his attorneys of record, John M. Sheehan, J. Howard Edmondson and Sam H. Lattimore; and the defendant, Edwin Lee Kessler, appearing in person and by and through his attorneys of record, James H. Harrod and Ted R. Elliott.

Whereupon, The Court proceeded to hear argument of counsel on the motion of the plaintiff, State of Oklahoma, to continue said hearing, and The Court being advised in the premises finds that said motion to continue hearing should be overruled.

IT IS THEREFORE ORDERED that the Motion for Continuance of the plaintiff, State of Oklahoma, is overruled, to which the plaintiff excepts and exceptions are allowed.

Whereupon, the matter comes on for further hearing upon the separate motions to quash the indictment filed by each of the defendants, Stephen Chandler and Edwin Lee Kessler. The Court proceeded to hear testimony of witnesses called by each defendant in support of said motions, and the matter being continued from day to day and further testimony heard on the 23rd, 24th and 26th days of November, 1965.

Now, on this 26th day of November, 1965, The Court having heard testimony of each of said defendants and said defendants having rested their case in support of their separate Motions to Quash the Indicement, and the State having announced in open court that it did not desire to put on evidence and therefore rested its case, The Court, after hearing argument of counsel and being fully advised in the premises, finds that the evidence presented to the Grand Jury was insufficient to show that the crime of Conspiracy to Cheat and Defraud the State of Oklahoma has been committed, as charged in the indictment and that no crime has been committed by the defendants or either of them, and that the Motion to Quash the Indictment of each defendant should be sustained.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED by The Court that the Motion to Quash the Indictment filed herein by the defendant, Stephen Chandler, is sustained, that defendant Stephen Chandler is hereby ordered discharged and his bond exonerated.

IT IS FURTHER ORDERED, ADJUDGED and DECREED by The Court that the Motion to Quash the Indict-

ment filed herein by the defendant, Edwin Lee Kessler, is sustained, that defendant Edwin Lee Kessler is hereby ordered discharged and his bond exonerated.

To all of which the plaintiff, State of Oklahoma, excepts and exceptions are allowed.

/s/ Donald E. Powers
Donald E. Powers,
Assigned Judge of the District Court

I, DALE SMITH, Court Clerk for Oklahoma County, Okla., hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears of record in the District Court Clerk's Office of Oklahoma County, Okla., this 3 day of Jan., 1966.

DALE SMITH, Court Clerk
By Richard Morris, Deputy

EXHIBIT E

FILED
United States Court of Appeals
Tenth Circuit
NOV 30 1965
Robert B. Cartwright
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7907—November Term, 1965

| | | |
|---|---|---|
| W. H. PAT O'BRYAN, Appellant, | ) | |
| Vs. | ) | Appeal From The United States District Court |
| STEPHEN S. CHANDLER, Appellee. | ) | For The Western District of Oklahoma. |

Reagan M. Martin, Dallas, Texas, for Appellant.

Granville Tomerlin, Oklahoma City, Oklahoma, for Appellee.

Brief of the United States as Amicus Curiae, John W. Douglas, Assistant Attorney General; Morton Hollander and David L. Rose, Attorneys, Department of Justice, Washington, D.C.

Brief for the Oklahoma Bar Association as Amicus Curiae, Roy C. Lyttle and William D. Curlee, Oklahoma City, Oklahoma.

Before PICKETT, LEWIS, BREITENSTEIN, HILL and SETH, Circuit Judges.

PICKETT, Circuit Judge.

W. H. Pat O'Bryan, an Oklahoma attorney and Certified Public Accountant, instituted this action against Stephen S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma, to recover damages, actual and punitive, for alleged malicious prosecution, libel and slander,[1] arising out of certain activities of Judge Chandler before a grand jury, which resulted in a criminal indictment against O'Bryan. This is an appeal from an order dismissing the complaint on the grounds that the alleged misconduct of Judge Chandler was not clearly in the absence of his jurisdiction as a Judge, and that he therefore was judicially immune from civil liability.

It is settled doctrine that a Judge is not liable in damages for acts performed in a judicial capacity unless there is a "clear absence of all jurisdiction" over the subject matter. This is true, even though the Judge's acts are in excess of his jurisdiction and done maliciously, corruptly, or arbitrarily. Bradley v. Fisher, 13 Wall 335. This court, in Ryan v. Scoggin, 245 F.2d 54, 58, announced the rules in these words:

> "It is a principle of universal acceptation in its relation to judges at all levels that a judge is not liable in damages resulting from an order entered or a judgment rendered in an action or proceeding over which the court has jurisdiction of the subject matter and of the parties, even though such order or judgment is in excess of the vested jurisdiction, or is otherwise erroneous and is set aside or reversed on appeal or other review. That deep-seated fundamental rule of ancient origin and frequent repetition rests upon con-

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[1] The action was brought in the District Court of Oklahoma City, Oklahoma, and timely removed to the United States District Court for the Western District of Oklahoma upon petition of Judge Chandler, under the provisions of 28 U.S.C. § 1442.

> siderations of public policy that such immunity is a concomitant of an independent judiciary which is indispensable to the well-being of a free people. * * * (Citing cases). It is only in instances in which a judge acts or proceeds in the clear absence of any color of jurisdiction or proceeds officially in respect to a cause or matter over which the court is clearly without any color of jurisdiction that he may be subjected to personal liability as a trespasser for damages arising out of his unauthorized act. * * *"

See, also, Barr v. Mateo, 360 U.S. 564; Gregoire v. Biddle, 2 Cir., 177 F.2d 579, cert. denied 339 U.S. 949; Brictson v. Woodrough, 8 Cir., 164 F.2d 107[2], cert. denied 334 U.S. 849.

It is, of course, the general rule that in considering a motion to dismiss for failure of the complaint to state a cause of action, that all facts well pleaded are admitted. Ryan v. Scoggin, supra. The material allegations of the complaint, and exhibits attached thereto, show that O'Bryan had filed a claim for more than one million dollars in a bankruptcy proceeding known as the "Selected Investments case,"[3] then pending in Judge Chandler's court. At a hearing in the bankruptcy proceedings, O'Bryan first supported the claim with oral testimony; he later produced a letter contract in support of his claim. The court found the claim to be fraudulent, disallowed it, and required O'Bryan to return $5,000 to the Trustee in Bankruptcy.

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[2] The Brictson case was heard in the 8th Circuit before a panel of judges from the 10th Circuit, sitting by assignment.

[3] Matters involving the Selected Investments Corporation bankruptcy proceedings have been before this court in a number of cases. Carey v. Selected Investments Corp., 10 Cir., 319 F.2d 578; Burns v. United States, 10 Cir., 286 F.2d 152; Workman v. Harrison, Trustee, 10 Cir., 282 F.2d 693; Selected Investments Corp. v. Duncan, 10 Cir., 260 F.2d 918, cert. denied 359 U.S. 914.

O'Bryan was thereupon disbarred from the practice of law in the United States District Court for the Western District of Oklahoma. The Judge was convinced that the letter contract had been fabricated, that the claim was fraudulent, and that O'Bryan had committed perjury in his attempt to sustain it.

On November 7, 1961 a grand jury was convened in the Western District of Oklahoma where it was qualified by Judge Chandler and given the usual general instructions as to its duties.

It is alleged that when the grand jury had completed consideration of the cases to be presented by the United States District Attorney, Judge Chandler, after having consulted privately with the foreman of the grand jury concerning the O'Bryan matter, appeared personally in the grand jury room at the request of the foreman. Judge Chandler first announced that the room was "a United States Court Room now instead of a Grand Jury Room, to keep you all from having to come upstairs." He advised the grand jury that he was there at the request of the foreman to explain the original instructions and to answer questions submitted by members of the grand jury, and he said that when he left "you can reform as to the Grand Jury." Thereupon the grand jury foreman requested that the Judge furnish certain information which he had concerning O'Bryan's transactions in the Selected Investments Corporation matter. The O'Bryan claim was then explained in detail, including the reasons for its disallowance. The Judge explained that he was not suggesting that any indictment be returned, but that it was his duty to direct the attention of the grand jury to possible violations of criminal laws for investigation. The original instructions were reiterated, and the United States Attorney advised the grand jury that his office stood ready to produce any information that it desired. Thereafter a 2-count indictment

was returned charging O'Bryan with making a false claim in a bankruptcy proceeding and with concealing assets from a trustee in bankruptcy, in violation of 18 U.S.C. § 152. On September 28, 1962, Judge Fred Daugherty of the United States District Court for the Western District of Oklahoma, dismissed the indictment without prejudice, upon the ground that Judge Chandler's activities in the presentation to the grand jury of the O'Bryan matter was a "technical irregularity" which invalidated the indictment.

We cannot agree with O'Bryan's contentions that Judge Chandler's conduct was clearly in absence of any jurisdiction and that his acts were those of a private individual. While it appears that the Judge's method of suggesting that the grand jury investigate the O'Bryan matter may have been unusual, irregular, or even erroneous, there nevertheless was no clear absence of jurisdiction. The grand jury was regularly convened in the United States District Court for the Western District of Oklahoma, of which Judge Chandler was the Chief Judge. Acting in that capacity, he had qualified the grand jury, designated its foreman and deputy foreman, and submitted to it the usual instructions. It was an appendage to the court over which he presided. Brown v. United States, 359 U.S. 41, rehearing denied 359 U.S. 976. The O'Bryan claim had been heard by Judge Chandler in a proceeding pending in his court; that he strongly suspected irregularity in the filing of that claim is understandable. The propriety of his expressions of opinion as to O'Bryan's guilt is questionable; still, the Judge had the power and jurisdiction not only to call attention to what he thought was a violation of the law, but also to direct that available evidence be presented to the grand jury. Arbor v. Blue, 10 Cir., 45 F.2d 746.

After entry of the judgment dismissing the complaint, O'Bryan sought leave to file an amended complaint. The court refused to permit the pleading to be filed. It is con-

tended here that no responsive pleading had been filed, and that Rule 15(a) F.R.Civ.P. authorized the filing as a matter of right.[4] While there are decisions to the contrary,[5] this court has held that the right to amend without leave of the court ends "with the entry of a judgment dismissing the action" and the filing of amended pleadings thereafter is addressed to the sound discretion of the court. Feddersen Motors v. Ward, 180 F.2d 519. Accord: Swan v. Board of Higher Education of the City of New York, 2 Cir., 319 F.2d 56.

The prolix document submitted by O'Bryan as an amended complaint covers twenty pages of the printed record, much of which is completely extraneous matter interposed with scandalous and scurrilous statements. It is an attempt to state a cause of action based upon an alleged conspiracy entered into between Judge Chandler and ten other persons. These ten additional individuals are named as defendants without an order of the court. It appears from the amended complaint that the purpose of the so-called "conspiracy" was to effect a disallowance by Judge Chandler of O'Bryan's claim in the bankruptcy proceeding herein mentioned, and to cause a criminal indictment to be returned against him. The only substantive difference be-

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[4] Rule 15(a), F.R.Civ.P. provides:

"(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires * * *."

[5] Breir v. Northern Calif. Bowling Proprietors' Ass'n, 9 Cir., 316 F.2d 787; Fuhrer v. Fuhrer, 7 Cir., 292 F.2d 140; Peterson Steels v. Seidmon, 7 Cir., 188 F.2d 193; Kelly v. Delaware River Joint Comm'n, 3 Cir., 187 F.2d 93, cert. denied 342 U.S. 812.

tween the allegations in the original complaint and those in the proposed amended complaint is that those same acts complained of in the original complaint are now alleged to be the product of the conspiracy. The proposed amended complaint states that the acts of Judge Chandler were "wrongfully, willfully, knowingly, purposely designedly, fraudulently, maliciously, oppressively and corruptly" performed. These are the same acts for which we have heretofore said Judge Chandler could not be held liable in damages. As the trial Judge states, ". . . the acts of defendant [Chandler] of which plaintiff complains are the defendant's private meetings and conversations with the foreman of the grand jury in order to induce the foreman to initiate an investigation of the plaintiff, and the defendant's invasion of the grand jury room and the accusation of the plaintiff that the defendant there made." This is the gravamen of the original complaint as well as the tendered amended complaint. Allegations that the acts of Judge Chandler were part of a conspiracy would not be sufficient to state a claim upon which relief could be granted if the claim is otherwise barred by the doctrine of judicial immunity. Agnew v. Moody, 9 Cir., 330 F.2d 868, cert. denied 379 U.S. 867; Brictson v. Woodrough, supra. We find no abuse of discretion of the trial Judge in refusing to permit the filing of the amended complaint.

AFFIRMED.

[APPENDIX]

## EXHIBIT F

FILED
United States Court of Appeals
Tenth Circuit
DEC 27 1965
Robert B. Cartwright
Clerk

FILED
DEC 29 1965
VERA L. HOWARD
Clerk, U. S. District Court
By Josephine P. Gore
Deputy

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NO. 8216 - NOVEMBER TERM, 1965

TEXACO, INC., A Delaware Corporation, )
)
Petitioner, )
)
Vs. )
)
HONORABLE STEPHEN S. CHANDLER, CHIEF )
JUDGE FOR THE UNITED STATES DISTRICT )
COURT FOR THE WESTERN DISTRICT OF )
OKLAHOMA, )
)
Respondent. )

George W. Jansen, Los Angeles, California, and Phil E. Daugherty, Oklahoma City, Oklahoma, of the Firm of Ames, Daugherty, Bynum, Black, Ashabranner & Rogers, for Petitioner.

Gus Rinehard, Oklahoma City, Oklahoma, for Respondent.

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Before PICKETT, LEWIS, BREITENSTEIN, HILL and SETH, Circuit Judges, PER CURIAM.

In this mandamus action Texaco Inc. prays for an order directing Stephen S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma, to proceed no further in Hirschfield, et al. v. Texaco, Inc., Civil action No. 64-259, pending in the aforesaid court.

It is alleged that on June 6, 1964, the plaintiffs, Norman Hirschfield, Edward C. Joullian III, and Edward C. Joullian brought the aforesaid action in the United States District Court for the Western District of Oklahoma in which a judgment in the sum of $25,000,000 was sought against the defendant Texaco, Inc. for services rendered; that at the time the action was filed there was pending in the same court an action wherein W. H. Pat O'Bryan sought to recover damages in the sum of $10,000,000 alleged to have been caused by the misconduct of Judge Chandler before a federal grand jury which returned an indictment charging O'Bryan with a felony;[1] that in the damage action alleging Judge Chandler to be guilty of malicious prosecution, libel and slander, he was represented by five attorneys headed by John *M.* Cantrell, an Oklahoma attorney; that Mr. Cantrell was one of the attorneys representing the plaintiffs in the aforesaid Texaco suit; and that Mr. Cantrell continued to represent Judge Chandler in the O'Bryan case until after perfection of an appeal. Judge

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[1] The O'Bryan action was brought in an Oklahoma State Court. After removal to the United States District Court for the Western District of Oklahoma, it was dismissed on the ground that Judge Chandler was immune from civil liability for the alleged acts of misconduct. The dismissal was affirmed by this court. W. H. Pat O'Bryan v. Chandler, 10 Cir., — F.2d —.

Chandler moved to dismiss this petition for a writ of mandamus, and later filed what was designated a "waiver of Oral Argument and Rejoinder." These documents discuss the proceedings in the Texaco case at length, and we treat them as a response.

After the Texaco case was at issue, there were numerous and lengthy hearings on the question of disqualification, and other matters, relating to the case. Judge Chandler repeatedly stated that he did not intend to try the case, but refused to disqualify himself and assign it to another judge. 28 U.S.C. §455 provides:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

In Rapp v. Van Dusen, 350 F.2d 806, it was held that this statute disqualified a United States District Judge from proceeding in a civil case pending before him where attorneys for one of the parties had represented the judge in a mandamus action brought to compel the judge to transfer a case under 28 U.S.C. §1404(a). The judge in the mandamus action had no personal interest and was only a nominal party. In that case, at p. 812, the court said:

> "For the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality. Litigants are entitled, moreover, to a judge whose unconscious responses in the litigation may be struck only in the observing presence of all parties and their counsel. This right is impaired when a party is required to meet in his opponent an advocate who has already acted as the judge's counsel in the same litigation."

In the case at bar, Mr. Cantrell was representing Judge Chandler as a defendant in an action wherein the plaintiff sought a $10,000,000 judgment against the Judge as an individual. Confining our decision to the particular facts of this case, we hold that Judge Chandler's connection with one of the attorneys for the plaintiffs in the Texaco case was sufficient to constitute a connection with a "party or his attorney" within the meaning of Section 455.

The jurisdiction of this court to [illegible] action to guarantee a fair and impartial trial is no longer open to question. Upon an adequate showing, this court has held that it has the "power and inescapable duty," whether under the all-writs statute, 28 U.S.C. §1651, or under its inherent powers of appellate jurisdiction, "to effectuate what seems to us to be the manifest ends of justice." United States v. Ritter, 10 Cir., 273 F.2d 30, 32, cert. denied 362 U.S. 950; Occidental Petroleum Corp. v. Chandler, 10 Cir., 303 F.2d 55, cert. denied 372 U.S. 915, Reh. denied 373 U.S. 906.

IT IS THEREFORE ORDERED that the Honorable Stephen S. Chandler, Respondent herein, shall proceed no further in the case of Hirschfield, et al v. Texaco Inc., numbered 64-259 on the Civil Docket of the United States District Court for the Western District of Oklahoma, and that all further proceedings in that case be heard and determined by a judge to be designated by the Chief Judge of the United States Court of Appeals for the Tenth Circuit.

The Clerk of this Court is hereby directed to transmit forthwith a copy of this order to the Clerk of the United States District Court for the Western District of Oklahoma for filing in the aforesaid case, Civil No. 64-259.

FEB 9 19
JOHN F. DAVIS, C

No. [redacted] Misc.

# In the Supreme Court of the United States

OCTOBER TERM, 1966

HONORABLE STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, PETITIONER

*v.*

JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES

*ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS, AND PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS*

## MEMORANDUM FOR RESPONDENT

THURGOOD MARSHALL,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C., 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1111 Misc.

HONORABLE STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, PETITIONER

*v.*

JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES

*ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS, AND PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS*

## MEMORANDUM FOR RESPONDENT

As set forth in the response to petitioner's application for a stay, filed on behalf of the Judicial Council by the Solicitor General, the order challenged in this case (dated December 13, 1965) was wholly interlocutory in character, *i.e.*, pending a hearing and subsequent prompt consideration by the Council regarding what use, if any, to make of its powers in the premises. On January 27, 1966, the Council issued an order setting such a hearing for February 10, 1966, in Oklahoma City, Oklahoma (Appendix A, *infra* pp. 5–7).



206-655—66——1

After the Council order setting a hearing, the Council was advised by Judge Chandler that he did not wish to be heard or to appear at such a hearing. In addition, the Council was advised, through a letter sent by Judge Chandler to the other judges of the Western District of Oklahoma on January 24, 1966 (Appendix B, *infra* pp. 8–9), that he was presently willing and able to dispose of the pending cases assigned to him prior to December 28, 1965. This letter also stated that Judge Chandler was in agreement with an order, signed by the other active judges of the Western District of Oklahoma on January 25, 1965, pursuant to which new judicial business in the district would not, until further order, be assigned to Judge Chandler.

In these circumstances, the Council met on February 4, 1966, and issued the order reproduced in Appendix C to this Memorandum (*infra* pp. 10–16). This order expressly supersedes the prior Council order of December 13, 1965. In its place it adopts a portion of the January 25 order of the active district judges of the Western District of Oklahoma—as to which Judge Chandler agreed—dealing with the assignment of new judicial business in that district. With regard to pending judicial business—as to which Judge Chandler was in disagreement with the other active district judges—it provides, consistently with Judge Chandler's wishes, that "[a]ll civil, bankruptcy, and criminal cases assigned to Judge Chandler as of December 28, 1965, shall remain assigned to him." The January 25, 1966, order of the district judges of

the Western District of Oklahoma indicates that there were more than 170 such cases assigned to Judge Chandler as of December 28, 1965. The order of February 4 was adopted by the Council pursuant to its authority under 28 U.S.C. 137 to make "necessary orders" in situations where the district judges of any district are unable to agree upon the adoption of orders providing for the division of business among the judges of the district.

In view of the facts, (1) that the order of December 13, 1965, challenged by the petition in this case, has thus been expressly superseded by the Council's order of February 4, 1966, (2) that the Council order of February 4 confirms Judge Chandler's authority to dispose of the substantial case load presently before him, and (3) that the order of February 4 assigns new business in accordance with an order previously agreed to by Judge Chandler, the Solicitor General suggests that the petition in this case has become moot.

Respectfully submitted.

THURGOOD MARSHALL,
*Solicitor General.*

FEBRUARY 1966.

## APPENDIX A

In the Judicial Council of the Tenth Circuit of the United States

Special Session—January, 1966

IN THE MATTER OF THE HONORABLE STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA

*Order*

The Judicial Council of the Tenth Judicial Circuit of the United States met in special session at Denver, Colorado, on January 27, 1966. Council members present were:

Judge David T. Lewis
Judge Jean S. Breitenstein
Judge Delmas C. Hill
Judge Oliver Seth

Those present constituted the entire membership of Council except Chief Judge Alfred P. Murrah who was absent because he had previously disqualified himself from participation in proceedings relating to the Honorable Stephen S. Chandler, United States District Judge for the Western District of Oklahoma.

The Council gave consideration to its December 13, 1965, order in this matter, to the proceedings in the Supreme Court entitled "Honorable Stephen S.

Chandler, etc. v. Judicial Council of the Tenth Circuit of the United States, No. 1111, Miscellaneous," to the motion for stay filed therein by the petitioner, to the response thereto by the Solicitor General of the United States, and to the order of the Supreme Court entered on January 21, 1966. The Council noted the reference by the Supreme Court to the statement in the response of the Solicitor General that the Council contemplated prompt further proceedings and the order of the Supreme Court that the application for stay be denied "pending this contemplated prompt action of the Judicial Council."

IT IS ORDERED that this matter is set for hearing at 9:30 A.M., Thursday, February 10, 1966, in Room 5009 of the United States Courthouse at Oklahoma City, Oklahoma, when and where the Honorable Stephen S. Chandler may appear in person and with counsel and present such matters to the Council as he may deem fit.

The Secretary of the Council is directed to send a certified copy of this order forthwith to the Honorable Stephen S. Chandler and to his counsel, Thomas J. Kenan, 1366 First National Bank Building, Oklahoma City, Oklahoma.

DONE by the Judicial Council of the Tenth Judicial Circuit at Denver, Colorado, this 27th day of January, 1966.

/s/ David T. Lewis
DAVID T. LEWIS
*Circuit Judge.*

/s/ Jean S. Breitenstein
JEAN S. BREITENSTEIN
*Circuit Judge.*

/s/ Delmas C. Hill
DELMAS C. HILL
*Circuit Judge.*

/s/ Oliver Seth
OLIVER SETH
*Circuit Judge.*

A true copy.
Teste:

ROBERT B. CARTWRIGHT,
*Clerk.*

## Appendix B

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United States District Court
Western District of Oklahoma,
*Oklahoma City, January 24, 1966.*

Judge Fred Daugherty,
*United States District Court,*
*Western District of Oklahoma,*
*United States Courthouse,*
*Oklahoma City, Okla.*

Dear Judge Daugherty: Replying to your letter of January 21, regarding the suggested meeting in your chambers today at 2:00 p.m., in which you enclosed suggested order "called for by the Order of the Judicial Council" signed by all of the judges of the court except me, I have the following comment:

First, I am of the opinion that the only manner in which a Judicial Council can acquire jurisdiction to hear and determine the question of the division and assignment of cases filed in a United States District Court is by virtue of Section 28 U.S.C. 137, Paragraph 3, and then only after a district judge has certified to the Council that he disagrees with his associates as to the division and assignment of cases filed. There was in fact no disagreement among the judges nor was any disagreement certified to the Council. Every judge was receiving the cases he had requested and I had stated many times that whatever you, Judge Eubanks and Judge Bohanon agreed on, I would agree to and sign the order. I did sign such an order in accordance with the written request of the three of you and delivered it to Judge Eubanks on the morning of December 23rd, although all of you were prior thereto at all times receiving the number

of cases demanded. Only I could have disagreed and certified the question to the Council. I not only did not disagree but I agreed both orally and in writing and acted accordingly.

Specifically, I agree to that part of the order with reference to civil, bankruptcy and criminal cases filed on and after December 28, 1965, set out on the first page of the signed order presented to me, and this letter attached thereto will constitute my written agreement thereto and my election not to disagree or certify any disagreement to the Judicial Council as authorized by 28 U.S.C. 137.

With reference to cases already assigned to me, by valid agreed statutory order by virtue of 28 U.S.C. 137, referred to in the last paragraph on page one, i.e. my *pending* cases, I *disagree*. There is no provision of law that grants a Judicial Council jurisdiction over cases pending before a judge in the various stages of the judicial process after valid assignment to him. I consider it my duty to continue to assert my exclusive jurisdiction over these cases, and shall do so.

I call your attention to the fact that until this new order is finalized by this letter, the old division order is likely effective.

With kindest regards,

Sincerely,

(s) STEPHEN S. CHANDLER.

cc: Judge Bohanon
Judge Daugherty
Judge Eubanks
Judge Rizley

P.S. The statement in your letter "at your request" gives the wrong impression. We did discuss the matter.

S.C.

## Appendix C

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In the Judicial Council of the Tenth Circuit of the United States

Special Session—February, 1966

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### In the Matter of the Division of Business in the Western District of Oklahoma

*Order*

The Judicial Council of the Tenth Judicial Circuit of the United States met in special session at Denver, Colorado, on February 4, 1966. Council members present were:

Judge David T. Lewis
Judge Jean S. Breitenstein
Judge Delmas C. Hill
Judge Oliver Seth

Absent from the meeting was Chief Judge Alfred P. Murrah who did not attend because he had previously disqualified himself from participating in proceedings relating to the Honorable Stephen S. Chandler, United States District Judge for the Western District of Oklahoma.

The Council gave consideration to its December 13, 1965, order made in the matter and to all other subsequent proceedings including the order of the Council dated January 27, 1966, setting this matter for hearing at Oklahoma City upon February 10, 1966. The Council has now been advised, in writing, by each of the active district judges of the Western District of

Oklahoma, including Judge Chandler, that none wish to be heard or appear at such scheduled hearing or at all.

Among other things, this Council's order of December 13, 1965, provided as follows:

"It is further ORDERED that in the event the active judges of the United States District Court for the Western District of Oklahoma, including Judge Chandler, cannot agree among themselves upon the division of business and assignment of cases made necessary by this order, the Judicial Council, upon such disagreement being brought to its attention, will act under 28 U.S.C. § 137 and make such division and assignment as it deems proper."

By letter dated January 25, 1966, the active judges of the Western District of Oklahoma, but not including Judge Chandler, submitted to this Council an agreement and signed order pertaining to the division of business within the Western District of Oklahoma and covering all new business filed on and after December 28, 1965, and also covering all cases earlier assigned to Judge Chandler and still pending on December 28, 1965.

By letter dated January 24, 1966, and sent to the other district judges within the Western District of Oklahoma, Judge Chandler stated in pertinent part:

"Specifically, I agree to that part of the order with reference to civil, bankruptcy and criminal cases filed on and after December 28, 1965, set out on the first page of the signed order presented to me, and this letter attached thereto will constitute my written agreement thereto and my election not to disagree or certify any disagreement to the Judicial Council as authorized by 28 U.S.C. 137.

"With reference to cases already assigned to me, by valid agreed statutory order by virtue of 28 U.S.C.

137, referred to in the last paragraph on page one, i.e. my *pending* cases, I disagree."

The Council FINDS and CONCLUDES that:

1. No judge of the Western District of Oklahoma wishes to be heard at the hearing set for February 10, 1966, at Oklahoma City, and that consequently such hearing would serve no useful purpose.

2. The Council is informed of the present and past administration of the business within the Western District of Oklahoma as revealed by the files and records of the Clerk of the Western District, the reports and analysis of the same by the Office of the Administrator of the United States Courts, and by this Council's continuing review of the operations of that Court.

3. The within statements of Judge Chandler disclose his present willingness to dispose of the cases assigned to and pending before him prior to December 28, 1965.

4. In the circumstances a disagreement exists as to the division of business and the assignment of cases in the Western District of Oklahoma.

5. The effective and expeditious administration of the business of the United States District Court for the Western District of Oklahoma requires the Council to make this order under the power and authority granted to it by 18 [*sic*] U.S.C. §§ 137 and 332.

Accordingly, it is ORDERED that:

1. The hearing set by the Council order of January 27, 1966, is hereby vacated.

2. The civil and bankruptcy cases filed on and after December 28, 1965, shall be divided by lot when filed so that no person will know to whom a case is to fall until filed. The cases shall be divided as follows:

Judge Bohanon: 3 cases in 10.

Judge Daugherty: 3 cases in 10.

Judge Eubanks: 4 cases in 10.

Judge Rizley: Assist all Judges by request.

When companion cases are filed, that is, cases involving the same transaction regardless of parties, at first knowledge of such fact the companion cases shall be assigned or re-assigned to the Judge receiving the low numbered companion case under the regular procedure.

The criminal business of the Court shall be handled as follows: Beginning January 1, 1966, Judge Daugherty shall call and empanel a grand jury during January, 1966, and handle all indictments returned by it and all criminal business of the Court until April 30, 1966; Judge Bohanon shall call the grand jury into session during May, 1966, and handle all indictments returned by it and all criminal business of the Court until August 31, 1966, and Judge Eubanks shall call the grand jury into session during September, 1966, and handle all indictments returned by it and all criminal business of the Court until December 31, 1966. At the end of their respective periods for handling criminal business, each criminal Judge shall transfer to the succeeding criminal Judge all appropriate criminal cases not terminated or disposed of during his respective period.

3. All civil, bankruptcy and criminal cases assigned to Judge Chandler as of December 28, 1965, shall remain assigned to him.

4. The division of business and assignment of cases made herein may be amended or modified by written order signed by all active judges of the Western District of Oklahoma, provided that nothing contained herein shall be construed as preventing Judge Chandler from surrendering any pending cases for re-assignment to another active judge or to prevent transfer

between judges to whom new business is assigned pursuant to this order.

5. This order supersedes the orders of the Council entered on December 13, 1965, and on January 27, 1966, entitled "In the Matter of the Honorable Stephen S. Chandler, United States District Judge for the Western District of Oklahoma" and shall remain in effect until the further order of the Council.

An original copy of this order shall be retained in the records of the Council; a duplicate original shall be forthwith transmitted to the Clerk of the United States Court for the Western District of Oklahoma to be imbedded in the records of the court; a copy shall be forthwith transmitted to the Chief Judge of the Court for the Western District of Oklahoma; and a copy shall be forthwith transmitted to the Associate Judges of such Court.

Made and entered by the Judicial Council of the Tenth Circuit this 4th day of February, 1966.

/s/ DAVID T. LEWIS,
*Circuit Judge.*

/s/ JEAN S. BREITENSTEIN,
*Circuit Judge.*

/s/ DELMAS C. HILL,
*Circuit Judge.*

/s/ OLIVER SETH,
*Circuit Judge.*

---

LEWIS, *Circuit Judge.*

I did not join in the interlocutory order of the Council of December 13 because I was unconvinced that statutory or inherent authority existed for its issuance. Subsequent events have indicated that a substantial difference of opinion may exist as to the extent of power properly accorded to the Council and certain it is that Judge Chandler very properly could,

as he did, seek to have the propriety of the December 13 order reviewed and stayed pending such review. But I cannot condone, and must protest, the subsequent public acts and statements of Judge Chandler done and made in complete disregard of the Council order and in disregard of the statutory duty of district judges under 28 U.S.C. § 332 to "promptly carry into effect all orders of the judicial council." Neither the fact, if such it be, that the Council acts in an administrative capacity and is thus without statutory or inherent power to impose judicial discipline nor the fact that Judge Chandler sincerely believes the December 13 order to be totally invalid justifies in any way his flagrant disregard of the order. Proper judicial conduct dictated compliance with the order pending orderly determination of its validity.

I do join in the order filed today. I believe the power of the Council in such regard is clearly contained both within the provisions of 28 U.S.C. § 137 and 28 U.S.C. § 332. Although the order contains no provision for continuing assignment to Judge Chandler of cases other than those pending as of December 28, I do not consider such a provision necessary. Judge Chandler has publicly announced his intent to accept senior status under 28 U.S.C. § 371(b) in the immediate future and has agreed not to participate in new business.

---

SETH, *Circuit Judge.*

I agree with the foregoing order of the Judicial Council except paragraph 3 which reassigns to Judge Chandler those cases which were assigned to him before December 28, 1965. In my opinion, this paragraph of the order does not go far enough. I would instead have assigned a lesser number of cases. Further, in view of the apparent disregard by Judge

Chandler of the previous order of the Council by purporting to take action in cases after December 28, 1965, which action is of doubtful validity, I would reassign such cases to other judges of the Western District of Oklahoma so that valid orders might be entered for the protection of the litigants whose rights may have been interfered with by the action of Judge Chandler. The order of the Council was in effect after December 28, 1965, and if doubt existed as to its validity it should have been challenged by Judge Chandler only in the normal way.

U.S. GOVERNMENT PRINTING OFFICE:1966

FILED
FEB 2 3 1966
JOHN F. DAVIS, CLERK

In the

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. [redacted]2, Miscellaneous

STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE
FOR THE WESTERN DISTRICT OF OKLAHOMA,
*Petitioner,*

VERSUS

JUDICIAL COUNCIL OF THE TENTH CIRCUIT
OF THE UNITED STATES,
*Respondent.*

## PETITIONER'S REPLY TO MEMORANDUM FOR RESPONDENT, AND PETITIONER'S SUGGESTION THAT HIS PETITION HAS NOT BECOME MOOT

THOMAS J. KENAN
*Counsel for Petitioner*

February ....., 1966

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 8-8750

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# In the
# Supreme Court of the United States
OCTOBER TERM, 1965

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## No. 1111, Miscellaneous

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STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE
FOR THE WESTERN DISTRICT OF OKLAHOMA,
*Petitioner,*

VERSUS

JUDICIAL COUNCIL OF THE TENTH CIRCUIT
OF THE UNITED STATES,
*Respondent.*

---

**PETITIONER'S REPLY TO MEMORANDUM FOR RESPONDENT, AND PETITIONER'S SUGGESTION THAT HIS PETITION HAS NOT BECOME MOOT**

---

### ARGUMENT

The Judicial Council has now held three special sessions and issued three orders foundational to these proceedings.

The first session and order stripped Judge Chandler of all his judicial power. The second set this matter for a hearing. The third cancelled the hearing, reinstated Judge Chandler's authority to hear cases pending before him when the first order was filed, but continued to deny him authority to hear cases filed in his court after that date.

All three special sessions were secret and closed. All were held without notification to Judge Chandler. He does not even now know the nature of any complaints against him or who his detractors are. He was denied every element of due process.

He stands today allowed to hear out old cases assigned to him, but his judicial authority has lost its rejuvenative powers. The Judicial Council now suggests that this case is moot. In considering this suggestion, it is well to examine carefully what has happened.

At the first special session of the Judicial Council, an order issued *sua sponte* stripping Judge Chandler of all of his judicial power. The authority for this unprecedented summary action was stated to be a single statute, 28 U.S.C. § 332.

The order directed that all cases pending before Judge Chandler be reassigned to the other judges of his court and that no new cases could be assigned to him. It further directed that if the judges of his court, he included, could not agree upon the necessary redivision of the court's business, then the Judicial Council would do so, under the authority of a second statute, 28 U.S.C. § 137.

Judge Chandler challenged the Judicial Council's jurisdiction and authority by filing this action in this Court for a Writ of Prohibition and/or Mandamus. He also filed an Application for a Stay of the Judicial Council's Order. Both are still pending.

In opposing Judge Chandler's Application for Stay, the Judicial Council, through its counsel, The Solicitor General,

referred darkly to some matters on file, suggested that a third statute, 28 U.S.C. § 272(b), was also available as authority for the Judicial Council's assault upon Judge Chandler (thus tacitly charging that Judge Chandler was mentally disabled), and asserted that "public confidence in the federal judiciary would inevitably be impaired if Judge Chandler was allowed to preside over the District Court" during these proceedings. The Judicial Council also represented to this Court that the order was "entirely interlocutory in character," that the Council had "intended to permit" Judge Chandler to be heard, that "upon a request by Judge Chandler" the Council would promptly conduct a hearing, and that "at these proceedings, the Council contemplates that Judge Chandler will, if he wishes, appear before the Council."

This Court, while expressing "no opinion concerning the propriety of the interlocutory action taken" by the Council, denied the Application for a Stay "pending this contemplated prompt action of the Judicial Council."

Judge Chandler quickly notified this Court and the Judicial Council that he would neither request nor attend a hearing conducted by a body whose very jurisdiction he challenged, and he urgently renewed his application for Stay of the Council's Order.

The Judicial Council thereafter held its second secret session and issued a most bizarre "Order." A "hearing" was ordered for February 10, 1966, at Oklahoma City, but no person, including Judge Chandler, was ordered to attend. The subject matter of the hearing was not even given, but

Judge Chandler was advised he "may appear in person and with counsel and present such matters to the Council as he may deem fit."

Could it be that Judicial Councils have full power to strip federal district judges of their powers but lack the authority to order proper hearings to this end? Whatever the case, this second order was patently an invitation for Judge Chandler to institute his own destruction.

When this Court temporarily denied a Stay of the Judicial Council's first order, the other judges of Judge Chandler's court understandingly interpreted this as requiring them to comply with the Council's Order by dividing among themselves his cases. Since the first order provided that Judge Chandler was to participate in this action, he was asked by his colleague district judges to agree to a proposed written order of division.

It was at this time that Judge Chandler detected how cleverly the first order had been constructed: If he agreed to a division of his cases, it could be said he acquiesced in the Council's Order. But if he disagreed, the Council could refer to such disagreement as conferring jurisdiction upon it under the provisions of 28 U.S.C. § 137.

Since the sole issue of these proceedings is the jurisdiction of the Judicial Council, Judge Chandler wished to avoid at any cost action which might appear to cure the jurisdictional problems of the Judicial Council. After careful consideration, he concluded his best strategy required that he go along with the other district judges with respect to the assignment of new cases in his court, but that he

should stand firm and refuse to give up those cases already pending before him and moving along in the judicial process when the first order was filed. He reached this conclusion after a careful study of 28 U.S.C. § 137 convinced him such statute refers only to newly filed cases and not to cases already assigned to judges.

Soon thereafter, a third secret and special session was held by the Judicial Council, and a third order was issued. This order cancelled the hearing, restored to Judge Chandler his powers with respect to his old cases, noted his disagreement with his colleagues with respect to these old cases and cited this as its authority to divide all new cases among the other judges, and stated that the first order was superseded.

It should be noted that the Judicial Council initially proceeded against Judge Chandler under the authority of 28 U.S.C. § 332, the Judicial Council's "housekeeping" statute. But when this authority was attacked, it maneuvered over to 28 U.S.C. § 137, the Judicial Council's "peacemaking" statute. It did this by contriving an artificial disagreement over the division of cases in Judge Chandler's court. The maneuver was then used by the Council to pronounce the first order dead, and the Council refers to this maneuver as a reason for suggesting that these proceedings are moot.

These proceedings are not moot. The third order's statement that the first order is superseded is only playing with words. The events referred to in the third order—the letters written, the stands taken, the moves made—all had their birth in the first order. All is inexorably bound.

It is peculiar justice if the Judicial Council can whisk out of sight the first order and thereby moot the case whenever it feels it can advantageously settle for the battle lines of the day. The Judicial Council has only sacrificed a chess piece for position on the board.

In its phraseology and its directives, the third order was an obvious attempt to moot this case, to grasp at every jurisdictional straw, and to leave Judge Chandler as crippled as possible.

Judge Chandler and the other district judges in his court all acted under duress when they reached an agreement over the division of new cases filed in their court. On the one hand, the other judges acted only under the compulsion of the first order of the Judicial Council. This was duress. On the other hand, Judge Chandler agreed to eliminate himself from hearing new cases only to prevent any possibility of a disagreement which might bestow upon the Judicial Council the jurisdictional power it desperately needed and was seeking under the provisions of 28 U.S.C. § 137, the "peacemaking" statute of judicial councils. This, too, was duress.

Yet, the Judicial Council, in its third order, in what amounted to a legal *tour de force*, cited the disagreement over old cases as bestowing Section 137 powers upon it in order to reassign new cases.

Judge Chandler feels like Alice in Wonderland: An order issues from a Star Chamber proceeding commanding him and the judges of his court to take from him and divide among them his cases. Under this duress, they do so.

Judge Chandler, challenging the order, but under the duress of avoiding the tactical danger which lurks in the peace-keeping statute of judicial councils, submits to a division of his new cases and insists only upon retaining his old cases. The Judicial Council surveys the situation and decides to attempt an exchange of chess pieces for positional advantage: it withdraws from the struggle over old cases, cites this contrived disagreement as authority to divide new cases (over which no disagreement existed), pronounces the first order "superseded," and suggests the case is now moot.

This Court will surely recognize that the first order was the bulldozer to move Judge Chandler where he now is. The third order cements him in place, and the superseding of the first order is only sleight of hand.

The issue in this case has never changed: does the Judicial Council have authority—constitutional or statutory—to strip Judge Chandler of his judicial powers, in proceedings shocking for their absence of due process, and for reasons either unrevealed or inappropriate on their face? Judge Chandler's judicial powers today are dying on the vine. By order, maneuver and counterorder, the Judicial Council has cut the taproot of these powers.

The Memorandum for Respondent, suggesting mootness, seems to refer to the present situation as free of conflict and as a happy state of affairs altogether. Let the record show that Judge Chandler feels his dismemberment, remembers the Judicial Council to be his assailant, and recognizes the Judicial Council's third order as a replacement of troops, not a withdrawal.

Let the record also show that Judge Chandler has complete confidence this Court will not overlook the due process aspects of this case, that it will not forget Judge Chandler has never had a hearing, that the Judicial Council still proceeds as if he had no rights or has forfeited them. This Court has won an immortal place in history by its insistence that due process be always fully observed, even though a person be only a common felon.

Finally, let the record show that the Judicial Council—confident it has full power to destroy a district judge but unsure it has sufficient power to order him to a hearing—has found it necessary to try to switch power bases. 28 U.S.C. § 137 has been artificially mobilized in an effort to reinforce 28 U.S.C. § 332. This is a great move forward, for danger to the federal judiciary—the danger of a household tyrant destroying the independence of trial judges—lurks in the powers of judicial councils.

Judge Chandler is taking the liberty of attaching a personal statement to his pleading.

Respectfully submitted,

THOMAS J. KENAN

*Counsel for Petitioner*

February ——, 1966

# APPENDIX

## PERSONAL STATEMENT OF JUDGE CHANDLER

Remarks by friends of justice, both in the press and in and before the Congress, lead me to conclude I have misled some about the nature of my Supreme Court case involving the Judicial Council of the Tenth Circuit.

I am fighting the belief of some appellate judges that justice is served if they can discipline district judges, the judges who first handle cases. I do not question the honesty or ability of these judges, but I believe their sincere convictions in this matter can destroy from within the federal judiciary.

The judicial conscience is personal to the judge, and it can never be surrendered to another. But when an appellate judge can discipline a district judge, the conscience of the latter is not secure. This is because judges, like all human beings, are frail.

When an American is a party to a case before a federal district judge, that judge should feel secure to decide the case on the merits as he sees them, and not as he believes the merits would be seen by appellate authority. The power to discipline is the power to intimidate and to control. This is the peril I hope is revealed to all.

I point no fingers. I recognize that an honest difference of opinion among judges is what is here concerned. I do not consider the personal aspect of the matter. I do see a trend, though, and foresee the ultimate destruction of the independence of trial judges. I hasten to raise this alarm.

Respectfully,

/s/ STEPHEN S. CHANDLER
STEPHEN S. CHANDLER

Office-Supreme Court, U.S.
FILED
MAR 17 1966
JOHN F. DAVIS, CLERK

No. [redacted] Misc.

# In the Supreme Court of the United States

OCTOBER TERM, 1965

HONORABLE STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, PETITIONER

*v.*

JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES

*ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS, AND PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS*

## SUPPLEMENTAL MEMORANDUM FOR RESPONDENT

THURGOOD MARSHALL,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C., 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1111 Misc.

HONORABLE STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, PETITIONER

*v.*

JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES

*ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS, AND PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS*

## SUPPLEMENTAL MEMORANDUM FOR RESPONDENT

This supplemental memorandum is submitted in response to matters raised in petitioner's reply to the earlier Memorandum filed on behalf of the Judicial Council.

The Judicial Council's order of February 4, 1966, issued pursuant to its authority under 28 U.S.C. 137 after Judge Chandler had declined to attend a hearing, had two parts:

(1) As to pending cases, the Council, taking note of Judge Chandler's expressed wish to dispose of his



211-102—66

current docket, authorized him to do so. Such action was clearly not coercive in that Judge Chandler was to take the very action he desired.

(2) As to new business, the Council adopted an assignment order, signed by all the active district judges in the Western District of Oklahoma except Judge Chandler, pursuant to which new judicial business in the district would not, until further order, be assigned to Judge Chandler. The Council took this action because, in its view, the condition of Judge Chandler's docket made it advisable that he substantially reduce that docket before undertaking new judicial business. In addition, Judge Chandler, in a letter written to the other active judges of his district and in his "Renewal of Application for Stay" filed in this Court (p. 6), had agreed with this course. Again, such action was not coercive because Judge Chandler, acting with the active district judges, agreed to the effective part of the Council's order and, indeed, represented his agreement to this Court.

In his reply to the Council's Memorandum, petitioner, however, now asserts that his agreement with the order assigning no new cases to him until further order was expressed only for reasons of "strategy," *i.e.*, that he so agreed in an attempt to deprive the Judicial Council of jurisdiction over the administration of the docket of the Western District of Oklahoma. It is not clear from petitioner's reply whether Judge Chandler is, in fact, willing and able to take on the assignment of new cases at the present time.

In these circumstances, the Judicial Council continues to believe it advisable that Judge Chandler substantially dispose of his pending docket before undertaking the assignment of new judicial business. At such time in the future as Judge Chandler certifies to the Council that he has substantially disposed of the business before him which is ready for disposition, and that he is willing and able to undertake new business, the Council will consider the modification of the present order to permit such business to be assigned to Judge Chandler. The Council believes that its present order, thus withholding the assignment of new business to Judge Chandler until his current docket is significantly reduced, is clearly authorized by 28 U.S.C. 137 and 332. We respectfully submit, therefore, that the petition for prohibition and/or mandamus be denied or, in the alternative, that the Court issue an order retaining the case upon its docket until such time as the Council acts upon any future certification by Judge Chandler of his readiness to participate in the assignment of new cases.[1]

THURGOOD MARSHALL,
*Solicitor General.*

MARCH 1966.

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[1] In our original Memorandum in response to the petition we suggested that the petition had become moot because the Council order of December 13, 1965, had been superseded by its order of February 4, 1966. In view of Judge Chandler's subsequent expressed disagreement with the February 4 order, and the relationship between these two orders, we agree that the case can no longer be deemed moot.

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# In the Supreme Court of the United States

OCTOBER TERM, 1965

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STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, PETITIONER

*v.*

JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES, RESPONDENT

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*ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS, AND PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS*

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## PETITIONER'S REPLY TO SUPPLEMENTAL MEMORANDUM FOR RESPONDENT

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GEORGE AND KENAN

March ——, 1966

# In the Supreme Court of the United States

OCTOBER TERM, 1965

---

No. 1111, Miscellaneous

STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, PETITIONER

*v.*

JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES, RESPONDENT

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*ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS, AND PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS*

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## PETITIONER'S REPLY TO SUPPLEMENTAL MEMORANDUM FOR RESPONDENT

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This reply is made to the supplemental memorandum for respondent.

The Judicial Council continues to act without authority. It now purports to require Judge Chandler to certify to it his willingness and ability to undertake new business.

The Judicial Council forgets that Judge Chandler does not presently hear new cases because he and the other district judges of his Court, even though under duress, so agreed. (See Judge Chandler's letter to one of his fellow district judges, dated January 24, 1966, appearing as Appendix B to Respondent's Memorandum for Respondent).

True, the Judicial Council on February 4, 1966, purported to order that Judge Chandler could hear no new cases (e.g., cases filed in his Court after December 27, 1965). But this order was patently illegal. Title 28 U.S.C., Sec. 137 did not authorize such action, because there was no disagreement among the judges of Judge Chandler's Court over the assignment of *new* cases. Any disagreement, which might have invoked the powers of 28 U.S.C., Sec. 137, existed with respect to *old* cases. Yet the disagreement (artificial, at that) over the assignment of *old* cases was cited by the Judicial Council as authorizing it to take over the assignment of *new* cases in Judge Chandler's Court. The logic of this is absurd.

Nor did 28 U.S.C. § 332 authorize the Judicial Council's Order of February 4, 1966. Petitioner's Petition for Writ of Prohibition and/or Mandamus sets forth the extremely limited scope of Section 332, as revealed by its legislative history. (See Petition for Writ of Prohibition and/or Mandamus: material following "Argument" on page 14 and continuing through the second paragraph on page 16, as well as the comparison of the revised and the original statute appearing on page 9). This section does not authorize the raw disciplining of district judges by appellate

judges. Yet, the Order of February 4, 1966, is only an attempt to recast into more acceptable terms the Judicial Council's earlier disciplinary action over Judge Chandler. Unfortunately, all of the Judicial Council's orders in this proceeding have been totally contaminated with the Council's original disciplinary intent.

The original order of the Judicial Council was clearly unjustified as exceeding the limited powers granted by the Congress, as usurping Congress' impeachment powers, as denying Judge Chandler due process of law, and as inappropriately relying on Judge Chandler's personal court actions as justifying the discipline rendered.

The second order of the Judicial Council, which called for some kind of a strange hearing, was withdrawn for general lack of interest.

The third order, that of February 4, 1966, torments one's powers of logic and rationality, and is supported neither by 28 U.S.C. § 137 nor by 28 U.S.C. § 332.

The Judicial Council's Supplemental Memorandum for Respondent recently filed in this Court, can only be regarded as a fourth order of the Council. It purports to qualify Judge Chandler's powers by requiring him to certify to the Judicial Council "that he is willing and able to undertake new business."

Judge Chandler challenges the authority of the Judicial Council to do this. He will certify to the Council neither his willingness nor his unwillingness, neither his ability nor the lack thereof. He does not recognize the right of judicial councils to crack the whip

over and to impose such restrictions on district judges. He particularly does not recognize such under the tortuous history of this case.

The twists and turns of this case should not obscure the principal issue: Do Judicial Councils have authority to discipline district judges?

Nor should the disciplinary nature of the Judicial Council's orders be obscured by the Council's attempt to now characterize them as merely cleaning up a district court's docket.

The proceedings were born in a shocking attack on Judge Chandler's judicial powers, a naked disciplinary action Once Judge Chandler challenged the very disciplinary authority of judicial councils, these proceedings have been marked by crude maneuvers of the Judicial Council to accomplish two objectives: One, to change the image of these proceedings from a disciplinary action to a purely docket-clearing administrative action; and two, to nevertheless subject Judge Chandler to as much discipline as possible. Surely, this Court will not be misled.

The way to expedite business in Judge Chandler's Court is to rid Judge Chandler of the time-consuming and nerve-racking burden of defending his jurisdiction against attacks by appellate judges who would arrogate unto themselves disciplinary powers over their judicial brethren. Judge Chandler continues to urge this Court to accept jurisdiction of this case and to hear it through. The business of his court suffers because of this proceeding. A question of immense public importance hangs—the question of appellate judges disciplining district judges. And, not to be

overlooked, a man, Judge Chandler, has been robbed of part of the worth of his life.

Respectfully submitted,

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*Of Counsel:*

GEORGE AND KENAN

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In the

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1967

2

## No. 8 Miscellaneous

STEPHEN S. CHANDLER,
UNITED STATES DISTRICT JUDGE
FOR THE WESTERN DISTRICT OF OKLAHOMA,
*Petitioner,*

VERSUS

JUDICIAL COUNCIL OF THE TENTH CIRCUIT
OF THE UNITED STATES,
*Respondent.*

**ON PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS**

## MOTION TO ADVANCE CASE

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June 3, 1969

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. CE 5-0030

In the
Supreme Court of the United States
OCTOBER TERM 1967

No. 3 Miscellaneous

STEPHEN S. CHANDLER,
UNITED STATES DISTRICT JUDGE
FOR THE WESTERN DISTRICT OF OKLAHOMA,
*Petitioner,*

VERSUS

JUDICIAL COUNCIL OF THE TENTH CIRCUIT
OF THE UNITED STATES,
*Respondent.*

**ON PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS**

## MOTION TO ADVANCE CASE

Petitioner moves the Court to advance on its docket his Petition for Writ of Prohibition and/or Mandamus. Such Petition was filed with the Court on January 6, 1966. *Chandler* v. *Judicial Council,* No. 1111, October Term, 1965.

## ARGUMENT

Petitioner, in his Petition for Writ of Prohibition and/or Mandamus, prayed that a writ of prohibition and/or mandamus issue to restrain the Respondent from taking the action against him set forth in Respondent's Order of December 13, 1965. Such Order effectively stripped the Petitioner of his judicial powers. It was entered secretly, without notice, without hearing or trial, without jurisdiction, without a semblance of due process, without any basis whatever in fact or in law.

For more than three years the Respondent's only response has been an attempt to delay decision by the Court or moot the action. By subsequent orders, the Respondent first superseded and then vacated its Order of December 13, 1965. These subsequent orders were designed to accomplish three purposes:

1. Remove from this controversy the Respondent's original reliance upon 28 U.S.C. § 332, 62 Stat. 902;
2. Substitute 28 U.S.C. § 137, 62 Stat. 897 as the authority for the Respondent's actions;
3. Make it appear that the matter is moot.

Under Respondent's renewed threat of itself dividing the new business and assigning the cases in the Western District of Oklahoma (under the authority of 28 U.S.C. § 137, 62 Stat. 897, and under the supposition that a disagreement existed in Petitioner's court concerning the division of business and assignment of cases), the Petitioner and the other district judges in the Western District of Oklahoma agreed to maintain the status quo, pending disposition of this case by this Court. The status quo involved the Petitioner's being assigned no new cases, since this had been the result of the Respondent's various orders.

The Petitioner has awaited action by this Court since January 6, 1966, at the expense of relinquishing his right to have cases assigned to him in his own court. He has borne this expense in order not to moot this case, so important to all federal district judges. Three and a half years have passed. He prays this Court to act.

On September 18, 1967, the Respondent advised the Clerk of the Court that, in effect, the Petitioner's rights

had been restored to him. This is not so. A full explanation of the matters relied upon in Respondent's letter of September 18, 1967, is set forth in the undersigned's letter to the Clerk dated October 4, 1967. Disposition of the case may have been delayed by the failure of the undersigned to furnish sufficient copies of his letter for all members of the Court. Fifteen copies of such letter are attached hereto.

The issues are clear. The Respondent has set up no legal justification for its action. There is no legal defense available to it. All of the relevant facts are before this Court. The Order speaks for itself. Adjudication of the issues is of momentous import to all federal district judges. Do Judicial Councils have the constitutional or statutory authority to discipline district judges? That is the important issue. And the issue has not been mooted, as the Respondent's original order lingers on in the transmuted form of the Petitioner's having no cases assigned to him, as explained above. *United States* v. *W. T. Grant Co., et al.*, 345 U.S. 629, 97 L.Ed. 1303, 73 S.Ct. 894 (1953).

This term of court will soon end. It is respectfully requested that this case, long ripe for decision, be advanced by the Court and that relief be granted immediately.

Respectfully submitted,

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June 3, 1969

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 7 Miscellaneous

STEPHEN S. CHANDLER, United States District Judge
for the Western District of Oklahoma,
*Petitioner,*

v.

JUDICIAL COUNCIL OF THE TENTH CIRCUIT
OF THE UNITED STATES,
*Respondent.*

*ON PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION*

## AMICUS CURIAE BRIEF

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

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**No. 3 Miscellaneous**

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STEPHEN S. CHANDLER, United States District Judge
for the Western District of Oklahoma,
*Petitioner,*

v.

JUDICIAL COUNCIL OF THE TENTH CIRCUIT
OF THE UNITED STATES,
*Respondent.*

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*ON PETITION FOR WRIT OF MANDAMUS*
*AND/OR PROHIBITION*

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## AMICUS CURIAE BRIEF

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I have asked to appear in this case as a friend of the Court with the hope that I can help place this case in its proper perspective. The constitutional and ethical questions involved are of vital national importance and the Court should not inadvertently place its stamp of approval upon the usurpation of power and violation of judicial ethics and constitutional rights involved in this action by failure to act.

I do not appear as an advocate in support of Petitioner personally although I must advise the Court that I have become familiar with the underlying facts involved by

reason of having voluntarily represented Petitioner in three actions brought by a disbarred lawyer in retribution for Petitioner's official act in disbarring him. I entered those cases at the request of lawyers of the District who originally volunteered to represent Judge Chandler, as did I, in the instant case when they first read in the headlines of the local press of the entry of the unprecedented and punitive order.

While I do not approach the case to seek vindication for Judge Chandler I am appalled by what has happened to him. I am here for the purpose of helping point out plainly to this Court both sides of the coin and the unhappy result if the Court fails to address itself to the vital ethical and constitutional questions involved. This Court should promptly decide this action on its merits.

The Court should adjudicate this matter at once for three reasons. First, adverse criticism of this Court may follow a failure to do so. Second, grave questions of judicial ethics are involved. And third, there is a clear violation of the constitutional concept of division of powers.

## FACTS

In December 1965 a majority of the members of the Judicial Council of the Tenth Circuit, a statutory administrative body composed of United States Circuit Judges but vested by Congress with no judicial power whatever, secretly signed an instrument entitled "Order," with the designation Circuit Judge after each signature, directed to Judge Chandler, a duly appointed, confirmed and qualified United States District Judge, filed the "Order" in the Office of the Clerk of the United States Court of Appeals for the Tenth Circuit, ordered the Clerk of the United States District Court for the Western District of Oklahoma to file it and had it served on Judge Chandler by the United States Marshal for the Western District of Oklahoma. The facts and dates have been presented to this Court repeatedly and are incorporated by reference. (See No. 3 Misc., Oct. Term 1967. *Chandler v. Judicial Council,* No. 1111, Oct. Term 1965.)

By its terms this instrument constituted a multiple judicial Writ of Prohibition prohibiting him from proceeding further in more than 150 cases in various stages of the judicial process over which he legally had acquired exclusive jurisdiction and in which he was then sitting. It also divested him of the power to act in cases thereafter filed, thus effectively divesting him of the power of his office. Specifically it provided "that until the further order of the Judicial Council" Judge Chandler "shall take no action whatever in any case or proceeding now or hereafter pending in the United States District Court for the Western District of Oklahoma."

This purported Writ of Prohibition also imputed to him dereliction in office. It was signed, filed, released to news media and served on Judge Chandler without prior notice, without hearing or trial, without constitutional or statutory jurisdiction and without a semblance of due process.

## ARGUMENT

In order to be able to look at this matter in the correct perspective the responsibility for the creation of the situation now confronting the Court must be placed where it belongs. It should not be assumed that Judge Chandler was guilty of improper conduct justifying the entry of the illegal order by the Council or is responsible for the ensuing damage to the judiciary as a whole caused by its improvident entry. He was clearly the victim. Since that time, he has acted only in defense of his jurisdiction and his personal civil rights handicapped by noteworthy judicial restraint. For the reason that he was not accorded due process, he must be accorded the absolute presumption of judicial competence and innocence of wrong. No evidence dehors the record may be considered. The order itself and the admissions of Respondent made in this action constitute the entire record. It must be presumed that the dire implications of the order are false, and that Judge Chandler's docket was current, which his pleadings herein assert.

Nor is it proper to think that he should abdicate his official duty to defend his jurisdiction and now drop this litigation in the interest of judicial harmony in order to protect the Members of the Council from possible embarrassment and this Court from the unpleasant duty of correcting the Council's error.

Judge Chandler doesn't care a snap for personal vindication. He does not need it. He is not interested in causing further embarrassment to the judges responsible for this mess. His actions do show that he cares a great deal for the sanctity of the judicial system and the independence of the trial judiciary. He could have mooted the case by retiring years ago but for the obligation he feels to his brother trial judges to obtain an adjudication of the questions involved.

Both the mortal wound to Judge Chandler and this unnecessary judicial tangle were occasioned by the unconstitutional acts of the judges who signed the order. It shows on its face that the action was taken unlawfully and after long deliberation. The purpose of the order was and its effect has been to obstruct, impede and prevent a United States District Judge from performing his duties. Until this Court acts to strike it down, it continues daily unlawfully to deprive Judge Chandler of new cases, and stands as a precedent inviting repetition.

The experienced Circuit Judges who signed the order must be presumed to have known that the Council had no such constitutional or statutory power. By no stretch of the imagination could such a Congressional grant of authority to discipline District Judges by the imposition of sanctions be read into any existing statute. They must also be presumed to have known that even if the Council had jurisdiction to enter such a punitive disciplinary order, Petitioner was at least entitled to constitutional due process.

It appears clearly upon the face of the order that the judges signing it deliberately arrogated unto themselves "supervisory" and disciplinary jurisdiction over the trial

branch of the judiciary and having done so, that they deliberately exercised it without due process by the entry of a punitive disciplinary order against a trial judge. This in effect constituted a multiple Writ of Prohibition, a Bill of Attainder, a criminal conviction of official dereliction, and deprived Judge Chandler of the powers of his office in disregard of those rights which it has traditionally been the duty of judges to protect.

It may be that the judges who signed the order were misinformed as to the facts with regard to Judge Chandler and were deluded into a sincere belief that it was their duty to save the country from a derelict judge and that the end justified the means. It may be that their zeal in the imagined righteousness of the cause led them to act without the judicious forethought and sagacity to be expected of qualified judges. But the false statements in the order and the finding that Judge Chandler was guilty of dereliction in office belie the claim the Council now makes that his docket was too heavy and they were merely helping him dispose of it.

In any event it is immaterial what misconception, if any, of fact or law the Council may have been laboring under or why it entered the "Order." It was entered without due process, and was clearly intended to destroy Judge Chandler as a judge. The judges who signed the punitive order are guilty of unbridled usurpation and abuse of judicial power flagrantly violative of all American precepts of judicial ethics and propriety.

The action of the Council in trying to mislead the Court in its pleadings and its letter of September 18, 1967, and thus to delay or prevent decision is distressing and hardly less reprehensible than the entry of the order. The futility of the apparent hope of the Council that Judge Chandler, who is in good mental and physical health, will die or just fade away, or that he will retire under the cloud of the Order, points up the urgent necessity and wisdom of an early adjudication by this Court.

The Supreme Court of the United States is not a forum in which the Council should be permitted longer to play cat and mouse in an effort to obscure the issues and delay adjudication in disregard of Judge Chandler's constitutional rights. Surely this Court should not indirectly approve the use of such defense tactics by failure to act promptly and effectively to correct the original wrong.

The Chairman of the Senate Judiciary Subcommittee on Judicial Machinery very aptly said, on March 4, 1966, just after the Council entered the order against Judge Chandler:

> "Moreover a Judge whose conduct of fitness is questioned unjustifiably is entitled to have his name cleared promptly."

The Court should not fail promptly to decide these important issues; otherwise there is danger to the survival of our constitutional concept of an independent judiciary. The Council's order is a flagrant attempt to usurp the power of the legislative branch of Government and legislate itself "supervisory" power over Federal trial judges, thus destroying their independence.

The Solicitor General of the United States should review this case, and confess judgment in favor of the Petitioner.

Each day decision is delayed compounds the wrong against Judge Chandler and the injury to the judicial system as a whole. A Federal trial judge has actually been found "unfit" and "defrocked" without trial by judges without even a color of jurisdiction. Could there be any case now before the Court where such a constitutional violation of the rights of a citizen has so long gone unredressed? Where constitutional and judicial ethical questions of greater importance are involved? Where such delaying tactics have been used in the defense of an action?

The Council cannot by order restore Judge Chandler's office to him. More important, it cannot restore his good name. Only this Court can do so by striking down the unconstitutional Bill of Attainder and the unwholesome legal precedent and the Court surely has the clear duty to do so.

A quotation from a statement by Senator Ervin to the Senate Judiciary Subcommittee on February 15, 1966, shortly after the order was entered by the Council puts the matter in focus:

> "The action of the Judicial Council of the Tenth Circuit in dismissing Judge Chandler was unwarranted and precipitous, and I agree completely with Justices Black and Douglas that the Supreme Court should have stayed the Order. As the Subcommittee knows, the Judicial Council relied on the third paragraph of 28 USC 332 in what I consider to be a monumental example of statutory misconstruction. As Justice Black has said, there is absolutely nothing in the language or legislative history of this Act that could be construed as authorizing the Council to strip a United States District Judge of his powers. To divine removal powers in this Act which grants the Council mere administrative or housekeeping authority is to unscrew the inscrutable. At best, the Council's action was presumptuous and denied Judge Chandler even elementary due process in defending himself; at worst, it could be disastrous to the independence of the Judiciary.
>
> "All Judges—even circuit judges—are human beings, and, as such, may be tempted to read mental incapacity into the actions and opinions of those with whom they consistently disagree. *If the action of the Tenth Circuit Council is allowed to stand, then any Circuit Council could easily decide to remove from the effective occupancy of this office any district judge whose official action displeases it any way,* especially where this Council can cite some eccentricity of temperament or personality. *It was from this eventuality that the Framers protected us* when they wrote Article II, Sec. 4 into the Constitution." (Italics supplied)

Not only this Court but all courts are now on trial by the public. A failure to resolve this matter may be considered an *implicit* approval by this Court of the deliberate

usurpation of power by the judges who are Members of the Tenth Judicial Council. It amounts to a "Star Chamber" Bill of Attainder against a named federal judge (*United States v. Archie Brown*, 381 U.S. 437, 14 L.Ed.2d 484, 85 S.Ct. 1707).

The original nationwide publicity incident to this case aroused great public interest and concern which the delay in adjudication has increased. The public is entitled to know what this Court thinks. The public is entitled to know whether the Circuit Judges were derelict or whether Judge Chandler was. And, of course, all United States District Judges are quite anxious to know whether they can now be disciplined like schoolboys and have no recourse in this Court.

The Judicial Council has broken through the jurisdictional boundaries imposed upon the entire judiciary by the Constitution and has transgressed the impeachment powers of the Congress and deprived Judge Chandler of his constitutional rights under Article III, Section I.

There is no defense for such abuse of power and it is important that this Court act at once to redress the wrong.

Respectfully submitted,

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June 11, 1969

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

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**No. 2 Miscellaneous**

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STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE
FOR THE WESTERN DISTRICT OF OKLAHOMA,

*Petitioner,*

v.

JUDICIAL COUNCIL OF THE TENTH CIRCUIT
OF THE UNITED STATES,

*Respondent.*

---

*ON PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION*

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## BRIEF OF PETITIONER AND WAIVER OF ORAL ARGUMENT

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

---

**No. 2 Miscellaneous**

---

STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE
FOR THE WESTERN DISTRICT OF OKLAHOMA,

*Petitioner,*

v.

JUDICIAL COUNCIL OF THE TENTH CIRCUIT
OF THE UNITED STATES,

*Respondent.*

---

*ON PETITION FOR WRIT OF MANDAMUS*
*AND/OR PROHIBITION*

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## BRIEF OF PETITIONER AND WAIVER OF ORAL ARGUMENT

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The Court on June 16, 1969, denied Petitioner's Motion to Advance this action for decision before the summer recess and entered an order setting it for Oral Argument on October 20, 1969.

There were only two courses open to the United States District Judge, Petitioner herein, when the unprecedented Writ issued by the Judicial Council of the Tenth Circuit was served on him. FIRST, to himself officially cite and punish

for contempt the Circuit Judges who signed it, and those aiding and abetting them, and to request the Executive Department to institute criminal proceedings against them for unlawfully obstructing and impeding justice in his court. SECOND, to seek immediate stay, injunctive relief and adjudication of his rights from this Court which has final appellate and review jurisdiction over the cases affected.

He chose the latter course as being more judicious and less likely to further undermine public confidence in the Federal Judiciary.

No other court was available. The astonishing "Order" which constituted a multiple Extraordinary Writ of Prohibition in all of the cases in which he was sitting and convicted him of dereliction in office without trial was signed by the judges of the Court of Appeals. The judges of that court had already acted and the Petition here may properly be considered an Application for Writ of Certiorari.

The voluntary self-serving actions of the Circuit Judges since the filing of this action cannot enlarge, change or alter the record or the issues involved. The raw disciplinary nature of the original "Order" cannot be obscured by the Council's later shamefaced attempt to characterize it as an effort to clean up a district court's docket. The subsequent orders are totally contaminated with the character assassinating disciplinary intent clearly revealed on the face of the original "Order". Nor can such subsequent voluntary actions moot the case. *United States v. W.T. Grant Co., et al.*, 345 U.S. 629, 97 L.Ed 1303, 73 S.Ct. 894 (1953).

The record was complete when the "Order" was signed, filed and served. It is either legal and valid or it is illegal and unconstitutional.

The strange "Order" or Writ discloses clearly on its face that the legality and ethicality of its unconstitutional secret issuance without notice, without trial, without even elementary due process, and without a word of competent evidence had been fully considered and that it was deliberately entered by four of the five sitting Judges.

Their premeditated unlawful action is a monstrous violation of all traditional American concepts of justice and judicial decorum. They convicted a United States District Judge of official dereliction and unfitness and prohibited him from performing his official duties. They recited half-truths which they knew at the time would falsely assassinate his character and hold him up to public scorn.

The Circuit Judges signed the punitive Writ with full knowledge that their act was a violation of the laws of the United States and the District Judge's Constitutional rights. The "Order" shows on its face that it was expressly designed to impede and obstruct him in the performance of his official duties and irreparably damage his reputation as an honorable and competent judge.

There is neither moral nor legal defense available to them. They deliberately lent their names and official power to the most shocking un-American proceeding ever conducted by members of the Federal judiciary. The deliberate aberrant action torments one's powers of logic and rationality.

While it seems incredible that the judges of the Tenth Court of Appeals could have acted so irrationally and improvidently, such is the undenied and undeniable fact. The District Judge is neither derelict, incompetent nor an unbending recalcitrant. His sole purpose in this action is to help preserve the sanctity of our constitutional Federal judicial system. Otherwise he would not have come here and would not now be here.

The principal issues are: Do Circuit Courts or Judicial Councils have authority to discipline District Judges by the entry of punitive Writs or otherwise? Are District Judges entitled to the same due process as other citizens? Does this Court approve arrogant and unbridled assumption and abuse of judicial power? Does this Court approve judicial usurpation of the powers of the Legislative branch? Does this Court approve intemperate wholly unfounded character assassination of a United States District Judge by Circuit Judges who claim to act as a Judicial Council?

The Constitution and the statutes of the United States creating Judicial Councils speak quite clearly. Assuming that the United States District Judge was derelict and unfit, it cannot seriously be contended that the Circuit Judges designating themselves a Judicial Council had the power to enter the vicious "Order" under any circumstances and certainly not without due process.

Nor did the members of the Council, each of whom designated himself "Circuit Judge" when he signed the "Order", if sitting as a Court of Appeals, have the Constitutional or statutory power to enter the Writ even had Constitutional due process been accorded the District Judge.

The "Order", if valid, constituted in common legal terminology a Star Chamber Bill of Attainder and a judicial multiple Writ of Prohibition and Mandamus in 163 cases in various stages of the judicial process in which the District Judge was then actually sitting and over which he had lawfully acquired exclusive jurisdiction.

The Writ was ordered filed with both Circuit and District Court Clerks. It was released immediately to news media. Petitioner first learned of it from bold headlines in the nationwide press and from radio and television newscasts. The following day he was subjected to the needless indignity of having the Writ served on him by the United States Marshal at the specific direction of the Circuit Judges.

The effect on the District Judge and on his jurisdiction over the cases in which he was sitting in which the public and the litigants were the real parties in interest was devastating. It was just as devastating as if it had been entered by the Court of Appeals which had potential appellate and review jurisdiction over the cases.

Had the Circuit Judges designated themselves "Pastime Supervisory Council" and placed the word "Circuit Player" under their signatures, the action would have been harmless and amusing. The United States District Judge could have smiled and ignored the order. But when they signed the "Order" each designated himself "Circuit Judge". They

then filed it in the Offices of the Clerk of the Court of Appeals and the Clerk of the District Court and ordered it served by the United States Marshal which invested it with the verity, dignity and legal gravity of a valid judicial Writ and a criminal conviction and sentence by the Tenth Court of Appeals. Thus it was the abuse of their power as Circuit Judges that shook the foundations of the judicial system.

Since the Council "Order" was in fact a judicial Writ signed by Circuit Judges as such, this Court will peer through the veil to the real source of the power which was so ruthlessly abused. The judges cannot hide behind their self-assumed mask.

This Court has power to issue the Writ sought by Petitioner by virtue of Article III Section 2 Clause 2 of the Constitution and Title 18 USC 1651 (a) in aid of its potential appellate and review jurisdiction of the 163 cases affected by the multiple Writ of Prohibition. *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 1 L.Ed.2d 290, 77 S.Ct. 309. The Court has the inherent power to prevent unlawful assumption and abuse of power and obstruction of justice by inferior judges as well as others and has the inherent power to protect the jurisdiction of a United States District Judge. It also has the power and duty to secure to Petitioner his Constitutional rights as a citizen.

By the entry of the Writ which was such a flagrant corruption of the judicial process the indicting judges invited the filing of this action. Their failure to face up to and meet promptly the issues presented and their devious puerile effort tc change, obscure and evade the issues and delay decision by the injection of immaterial after-the-fact matter *dehors the record* has been unbecoming and irreparably prejudicial to Petitioner's rights.

When the defamed District Judge, in an effort to defend and preserve his jurisdiction and carry out what he considered to be the responsibilities and duties of his official

position, asked this Court for relief instead of going begging to the "supervising" Circuit Judges as they anticipated he would, they quickly retreated from their untenable position But they had not the grace to retract their defamatory statements and findings of dereliction and unfitness, based only on recited, misleading half-truths, when the whole truth, then and now well known to them, belies their findings.

Their retreat falls far short of a forthright gentlemanly retraction and a frank admission that the findings were erroneous and the issuance of the Writ unconstitutional, illegal and improvident. They have not shown the courage and humility to be expected of strong men who have made an honest mistake. Rather, they have reacted as children caught with a hand in the cookie jar.

Lawyers have the ethical duty to be completely honest and straightforward with the Court and to meet the issues forthrightly and promptly. Judges are bound by even higher standards and it is vital that they be held to strict probity. Especially is this true where their calculated and gratuitous action has outraged judicial propriety.

A member of the trial judiciary has been convicted and sentenced without trial, has waited patiently, each Monday hoping for an adjudication redressing his wrongs and reaffirming his official status. He has felt more and more each week the weight of his self-imposed judicial restraint when adjudication was not forthcoming.

Since a fourth term of Court has drawn to a close and his urgent request for relief has grown another year older he is forced to the conclusion that the unethical tactics of the Council have actually misled the Court as to the real issues involved and that he should make this final attempt to clarify them.

For this reason he has sincerely and respectfully endeavored to restate the issues in their true light. If he has failed to make it unmistakably clear that he is entitled to the redress sought against the aberrant action of the Circuit Judges he nevertheless feels that he has now quite fully

performed his official duty to defend his jurisdiction and personally would prefer not to pursue the matter further.

But he does feel strongly the duty to pursue it in behalf of all other District Judges and the sanctity of our Constitutional form of government and respectfully requests that the matter be decided on its merits and the real issues clearly resolved and adjudicated.

If approved by this Court, the "Order" changes with four strokes of the pen the entire statutory law relative to the functions of Circuit and District Judges. It clearly violates the Constitutional concept of Division of Powers and completely destroys the independence of trial judges. The power to "supervise" a judge is the power to control his conduct which experience teaches inevitably leads to the power to control his judicial decisions.

Legislation is now pending in Congress initiated and strongly supported by those who seek the power to "supervise" trial judges and thereby destroy their independence. Indeed, the punitive "Order" here was carefully fashioned by some who wish to concentrate the judicial power of the United States in a few. They intended for the illegal bludgeoning of Petitioner to furnish a glaring example of the need for such proposed unconstitutional legislation. It was at their behest that the "Order" was executed and issued by the Tenth Judicial Council.

This proposed legislation would change the whole plan of the Constitution by providing some "Especially Qualified Supervising Judges" to execute the Constitutional function of policing the judiciary which our forefathers who themselves had suffered under the heel of tyrants and who wished to insure "the liberty of the people by guaranteeing that they have judges wholly independent", saw fit to vest, to a very limited extent only, in the Congress.

The Act creating Judicial Councils, Title 28 USC Section 332, is the root of the evil. It was fashioned and piloted through an unsuspecting Congress by Circuit Judges avid

for the power to "supervise". Of course Congress read no such power in it, but those Circuit Judges did.

Rather than enactment of the proposed legislation, the Congress should instead totally abolish Judicial Councils. The very thought that it is a proper function of a judge to exercise any kind of supervision whatever over another judge is absurd and should be completely excised from the thinking of those sincerely interested in improving our judicial system. Those who would make second class citizens of trial judges do not remotely understand what a judge is—what he should be and what he *must* be.

No amount of oral argument can make the issues in this action clearer. The law is crystal clear and further presentation of the facts by oral argument without going entirely *outside* of the record could only be repetition of matter heretofore fully presented by the papers heretofore filed.

Since it is apparent that oral argument can throw no additional light on the pertinent issues, a request by Respondent for oral argument can only be attributed to the desire to obtain the halls of this Court as a forum to argue the merits of the proposed legislation.

The Constitutional forum for those who wish to change the jurisdiction and functions of Circuit and District Judges is the Congress of the United States. It is not the Judicial Council of the Tenth Circuit nor is it this Court of last resort.

The "Circuit Judges" have already had more than three years to face up to the issues. Their time to respond expired February 6, 1966. After their fashion they responded February 9, 1966. The record reflects clearly that they have failed to meet their ethical and official obligation to the Court and to Petitioner. Unless it is thought that they are entitled to greater rights than other citizens brought befor this Court they should not now be invited to speak further nor permitted to do so.

To delay this case further for oral argument will constitute a travesty on justice. Justice delayed is justice denied. This Court has never permitted such a violation of a citizen's Constitutional rights to go long uncorrected, particularly one that offends so severely Constitutional division of powers and due process of law.

Further delay will appear to the public to be a tacit approval by this Court of the un-American abuse of power and the libelous findings against the District Judge and cause additional loss of public respect for the dignity and integrity of the judiciary as a whole. It will also make it appear that no United States District Judge can in the future expect from this Court immediate protection of his jurisdiction and his Constitutional rights should they be obstructed by a similar tyrannical whim of Circuit Judges.

As a member of the Bar of this Court since April 13, 1926, and as a United States District Judge since May 13, 1943, Petitioner wishes to take full responsibility for the filing of this paper and the candid statements made here. For that reason he files it *pro se*. He sincerely believes that a careful reading of the pleadings and briefs filed by Counsel for Respondent and those filed by Petitioner's erudite counsel together with the concise and convincing brief filed by Mr. Shipley as *Amicus Curiae* on June 12, 1969, will justify the filing.

In view of the foregoing, Petitioner now respectfully requests this Court to reaffirm immediately the continuing power of his office, thus restoring to the United States his usefulness as a District Judge and his good name as a competent judge in order to, insofar as is at this time possible, repair the damage to the judicial system occasioned by the entry of the "cruel and unusual" Bill of Attainder and Writ of Prohibition which does such violence to Article I Section 1 and Section 2 clause 5, Section 3 clause 6, Section 8 clause 9 and clause 18, and Section 9 clause 3; Article II Section 2 clause 2 and Sections 3 and 4; Article III Section 1 and Section 2 clause 2 and clause 3; Article VI clause 2 and clause 3;

Amendments IV, V, VI, VIII and XIV of the Constitution of the United States of America and its concepts of freedom and justice and the safeguards placed therein to Guarantee them to every citizen.

The Constitution and laws made in pursuance thereof is "the supreme Law of the Land". It was adopted "in order to . . . establish Justice . . . and secure the Blessings of Liberty."

To Safeguard and Guarantee justice and liberty to all citizens alike, Bills of Attainder are prohibited, due process and speedy trial are guaranteed, all officers and judges are required to take an oath to support and defend it and Governmental powers are purposefully divided between the Legislative, Executive and Judicial branches.

It should not be too presumptuous to assume that the Circuit Judges who signed the "Order" were familiar with the Constitution and laws. Thus is is not unfair to say that they knowingly and intentionally violated its most important provisions which were placed there for the very purpose of establishing and insuring Justice and Freedom to all.

It also seems proper to call attention to the Constitutional mandate contained in Article II Section 3 which provides that the Executive Department "shall take care that the laws be faithfully executed".

This provision was ignored by the former Solicitor General who appeared as counsel in defense of the unconstitutional and unlawful acts of Respondent. The only question before the Court was the power of the Council to issue the "Order", its legal validity. Neither guilt nor unfitness was involved. Yet the former Solicitor General took advantage of the occasion to go entirely outside of the record and personally make gratuitous unfounded defamatory statements about Petitioner including a subtle reference to 28 USC 372(b), and to insidiously express personal inflammatory opinions. (See Memorandum Opposing Stay filed

January 13, 1966 and attached letter.) This seems incredible but as in the case of the incredible actions of the Circuit Judges it is indisputable. It also is in writing and part of the record.

These gratuitous groundless defamatory statements and opinions are a shocking departure from the customary bounds of accepted standards of ethical practice. The entire Memorandum Opposing Stay furnishes an ideal example of the studied effort of Respondent and its counsel to mislead the Court. Confidence in these misleading and frightening statements and opinions of the former Solicitor General apparently led the Court to temporarily deny stay of the invalid "Order."

In view of this Constitutional mandate, the Department of Justice, now under new direction, may wish to consider what course it should now elect to pursue with reference to the Constitutionally indefensible action of the Circuit Judges who have also taken the oath to support and defend the "supreme Law" but who have so deliberately violated it in these vital areas.

The preparation and filing of this paper has been burdensome but the duty for one trained in the old school was clear, the time for judicial restraint and polite understatement long past. The time had come "to talk of many things." Petitioner regrets the necessity but apologizes only for the style if it seems dogmatic. He did not initiate nor welcome the confrontation and has not spoken for himself nor as a judge but has spoken as an advocate for others in behalf of a great principle must speak, with absolute candor and without fear as becomes both lawyer and judge. The high position of judge was not created for the judge but for those seeking justice. The statements may seem blunt and harsh but they are made without any bitterness or rancor whatever, with humility, with compassion for those involved, with great respect for their official positions and for this Court with its awesome duty. He has not yet lost his equanimity nor his sense of humor and hopes his adversaries have not.

Petitioner waives oral argument, submits the matter to the Court on the record, and respectfully prays the Court to set aside its Order for Oral Argument and for prompt relief.

Respectfully submitted,

STEPHEN S. CHANDLER
United States District Judge
United States Courthouse
Oklahoma City, Oklahoma
73101
*Pro se*

CORRECTED COPY

FILED
SEP 16 1969
JOHN F. DAVIS, CLERK

No. 2 Misc.

# In the Supreme Court of the United States

OCTOBER TERM, 1969

STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, PETITIONER

*v.*

JUDICIAL COUNCIL OF THE TENTH CIRCUIT

*ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF PROHIBITION AND/OR MANDAMUS*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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# In the Supreme Court of the United States

OCTOBER TERM, 1969

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No. 2 MISC.

STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, PETITIONER

*v.*

JUDICIAL COUNCIL OF THE TENTH CIRCUIT

---

*ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF PROHIBITION AND/OR MANDAMUS*

---

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE***

---

**OPINIONS BELOW**

None of the orders and minute entries of the Judicial Council of the Tenth Circuit has been reported as a judicial opinion. The order dated December 13, 1965, is set out in the Appendix to the petition for a writ of prohibition and/or mandamus at pp. i-iii. The order is reprinted at pp. 5–7 of the Memorandum filed on

* The Solicitor General has determined, pursuant to 28 U.S.C. (Supp. IV) 516 and 518, that since federal officers are both the petitioner and the respondent in this case, the United States should appear as *amicus curiae*, not as counsel for either party.

behalf of the Respondent in February 1966. The order of February 4, 1966, apportioning the judicial business of the District Court for the Western District of Oklahoma will be found at pp. 10–16 of that Memorandum. Judge Chandler's letter of August 28, 1967, proposing that the district judges certify that no change in the disposition of business was called for, is appended to the Motion to Advance. The district judges' certification to that effect is also contained in the appendix to the Motion to Advance. The minute entry from the Council's meeting on September 14, 1967, finding no further action necessary or appropriate at that time, is on file with the Clerk of this Court.

## JURISDICTION

Petitioner alleges that this Court has jursidiction under the All Writs Act, 28 U.S.C. 1651(a), to entertain his petition for relief in the nature of mandamus and/or prohibition, directed to the Judicial Council of the Tenth Circuit. Since the cause is presently before the Court on petitioner's motion for leave to file his petition, and since jurisdiction to act on the petition is not free from doubt, we have briefed this jurisdictional issue as a distinct question presented.

## QUESTIONS PRESENTED

1. Whether this Court has constitutional jurisdiction and statutory authority to entertain, in the first instance, an application for an extraordinary writ to review the determinations of a circuit judicial council.

2. Whether the determinations made by the Judicial Council of the Tenth Circuit regarding the judicial business to be assigned to petitioner as a district judge were authorized by statute and consistent with the Constitution.

## STATUTES INVOLVED

The Judicial Code, 28 U.S.C., provides in pertinent part:

> § 137. Division of business among district judges
>
> The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.
>
> The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.
>
> If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.
>
> § 332. Judicial councils
>
> The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit judges for the circuit, in regular active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall attend all sessions of the council.
>
> The council shall be known as the Judicial Council of the circuit.

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The chief judge shall submit to the council the quarterly reports of the Director of the Administrative Office of the United States Courts. The council shall take such action thereon as may be necessary.

Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

* * * * *

**STATEMENT**

In applying for leave to file a petition for a writ of mandamus and/or prohibition, petitioner seeks to challenge the statutory basis and the constitutional authority for the determinations made by the respondent, the Judicial Council of the Tenth Circuit, with respect to petitioner's activities as a district judge.

1. Petitioner, the Honorable Stephen S. Chandler, was duly appointed a United States District Judge for the Western District of Oklahoma in 1943, and he has served in that capacity ever since, including a number of years as chief judge of the district.

The Western District of Oklahoma is part of the Tenth Circuit. See 28 U.S.C. 41. By virtue of 28

U.S.C. 332, the circuit judges of a circuit are constituted as the Judicial Council for that circuit, with authority to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." District judges, the statute provides, "shall promptly carry into effect all orders of the judicial council."

On December 13, 1965, the Judicial Council of the Tenth Circuit, with the exception of Chief Judge Alfred P. Murrah who has disqualified himself from participation in these proceedings, convened in "special session" at Denver, Colorado. With the concurrence of four of the five circuit judges present the Council adopted an "order" (Pet. App. i–iii) which recited that:

> [i]n the past four years the Judicial Council at many meetings has discussed and considered the business of the United States District Court for the Western District of Oklahoma and has done so with particular regard to the effect thereon of the attitude and conduct of Judge Chandler who, as Chief Judge of that District, is primarily responsible for the administration of such business. * * *

The order noted that Judge Chandler had been a party defendant in both civil and criminal litigation [1] and had twice been before the court of appeals on applications to order him disqualified to handle certain

[1] See *O'Bryan* v. *Chandler*, 352 F. 2d 987 (C.A. 10) (*en banc*), certiorari denied, 384 U.S. 926; and Pet. App. xii-xiv, respectively.

litigation.[2] On the basis of the "entire situation", the Council found that "Judge Chandler is presently unable, or unwilling, to discharge efficiently the duties of his office" and that a change in the assignment of business was therefore necessary for "the effective and expeditious administration of the business" of the district court. Invoking its powers under 28 U.S.C. 332, the order accordingly directed that:

> until the further order of the Judicial Council, the Honorable Stephen S. Chandler shall take no action whatsoever in any case or proceeding now or hereafter pending in the United States District Court for the Western District of Oklahoma; that all cases and proceedings now assigned to or pending before him shall be reassigned to and among the other judges of said court; and that until the further order of the Judicial Council no cases or proceedings filed or instituted in the United States District Court for the Western District of Oklahoma shall be assigned to him for any action whatsoever.
>
> It is further ORDERED that in the event the active judges of the United States District Court for the Western District of Oklahoma, including Judge Chandler, cannot agree among themselves upon the division of business and assignment of cases made necessary by this

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[2] In both cases, including one decided after the signing of the instant order, writs of mandamus were issued against Judge Chandler. See *Occidental Petroleum Corp.* v. *Chandler*, 303 F. 2d 55 (C.A. 10) (*en banc*), certiorari denied, 372 U.S. 915; and *Texaco, Inc.* v. *Chandler*, 354 F. 2d 655 (C.A. 10) (*en banc*), certiorari denied, 383 U.S. 936.

> order, the Judicial Council, upon such disagreement being brought to its attention, will act under 28 U.S.C. § 137 and make such division and assignment as it deems proper.

Pursuant to the Council's direction, duplicate original copies of the order were "filed" by the clerks of the Court of Appeals for the Tenth Circuit and of District Court for the Western District of Oklahoma on December 27 and 28 respectively; a certified copy of the order was to be sent to the United States Marshal for that district for service upon Judge Chandler.

2. On January 6, 1966, petitioner filed with this Court his motion for leave to file a petition for a writ of mandamus and/or prohibition directed to the Judicial Council, and sought a stay of its order. Solicitor General Thurgood Marshall, "appearing on behalf of the Judicial Council," opposed the stay application, on the basis of the Council's representation "that the order of December 13 was intended to be temporary only, pending prompt further proceedings inquiring into the administration by Judge Chandler of judicial business in the Western District of Oklahoma." Accepting this assurance that the council's order was "entirely interlocutory in character pending prompt further proceedings," this Court on January 21, 1966, denied the stay application. 382 U.S. 1003.

In February 1966, Solicitor General Marshall submitted a Memorandum for Respondent suggesting that the case had become moot. This contention was based on certain intervening developments: On January 27, 1966, the Council had again convened in special ses-

sion, and, taking note of Judge Chandler's appearance before this Court and the Solicitor General's representations in opposition to the stay application, ordered the matter set for a hearing on February 10 in Oklahoma City, when and where Judge Chandler could appear in person and with counsel to "present such matters to the Council as he may deem fit" (Resp. Mem. pp. 5–7). Judge Chandler, however, advised the Council that he would not attend the hearing. In addition, the Memorandum pointed out, by letter dated January 24 (Resp. Mem. pp. 8–9), Judge Chandler had indicated to his colleagues on the district court that he agreed with the portion of a draft order prepared by them to the effect that no cases filed after December 28, 1965, would be assigned to him, but disagreed as to the proposal to reassign cases that were theretofore pending before him, over which he asserted continuing authority. These facts were communicated to the Council in a letter and an agreement and order signed by the other district judges on January 25, 1966. The Council reconvened on February 4. Finding that no district judge wished to be heard at the scheduled hearing, the Council concluded that it would serve no purpose and vacated the order for it. On the basis of Judge Chandler's letter, the agreement and order of the district judges, and its information about the state of business in the Western District (information from the files of the Clerk, from the Administrative Office of the United States Courts, and from its own continuing review of cases from the district), the Council found that a

disagreement existed as to the division of business warranting the exercise of its powers under 28 U.S.C. 137 and 332 to provide for the "effective and expeditious administration" of justice. The Council thereupon entered an order allowing Judge Chandler to continue to sit on cases filed and assigned to him prior to December 28, 1965, but apportioning subsequent cases, on a stated proportion by lot, among the remaining judges. The order "supersede[d]" the order entered on December 13, 1965, and was to remain in force pending further order of the Council, except that the division and assignment could be amended by written order of all the active district judges of the district (Resp. Mem. pp. 10–16).[3]

In his Reply Brief, Judge Chandler disputed the suggestion of mootness, stating that he had declined the offer of a hearing because he challenged the "very jurisdiction" (p. 3) of the Council. He also denied that the division of business had been settled to everyone's satisfaction by the intervening orders of the district judges and the Judicial Council. Rather, he contended, he had merely acquiesced, for reasons of "strategy" (p. 4), in the post-December 28 assignment proposal, in order to forestall a disagreement which would have given the Council clear power to act under 28 U.S.C. 137; any disagreement as to previously assigned cases, he argued, did not fall within

[3] Judge Lewis, who had not joined in the December 13 order, concurred on the basis of his view that the authority for the new order was "clearly contained" within 28 U.S.C. 137 and 332.

the compass of Section 137, on the ground that that statute only extends to newly filed cases.

In a Supplemental Memorandum for the Respondent, it was conceded that, in light of Judge Chandler's subsequently expressed disagreement with the February 4 order, and its relationship to the order of December 13, the case had not become moot. In that Memorandum (p. 3) the Council expressed its continuing belief that it was "advisable that Judge Chandler substantially dispose of his pending docket before undertaking the assignment of new judicial business".[4] The Memorandum continued (*ibid.*):

> At such time in the future as Judge Chandler certifies to the Council that he has substantially disposed of the business before him which is ready for disposition, and that he is willing and able to undertake new business, the Council will consider the modification of the present order to permit such business to be assigned to Judge Chandler. The Council believes that its present order, thus withholding the assignment of new business to Judge Chandler until his current docket is significantly reduced, is clearly authorized by 28 U.S.C. 137 and 322.

It was recommended that the petition be denied or retained on the docket until the Council acted on any future certification of willingness and ability to undertake new assignments.

Later in March, Judge Chandler submitted a Reply to that Supplemental Memorandum, asserting that the

[4] Judge Chandler had a backlog of approximately 160 cases at the time.

Council was continuing to act beyond its authority by purporting to require that he certify to it his subsequent willingness and ability to undertake new business. He contended that the Supplemental Memorandum setting forth the Judicial Council's position on this point was in effect a fourth order of the Council fixing still another condition on the exercise of his judicial office. He indicated that he would refuse to comply with this suggested procedure, since he continued to believe the Council was without authority in the matter and since he was attempting to litigate that very issue.

3. No further action was taken until the Summer of 1967. In June 1967, the Clerk of this Court wrote to the parties to ask them to keep him apprised of any further developments in the case. On July 12, 1967, the Judicial Council of the Tenth Circuit convened, and in light of a report showing that Judge Chandler had only twelve cases pending, concluded that a modification of its order of February 4, 1966, might be in order (Resp. Chronology of Events, p. 6). Circuit Judge Lewis thereafter transmitted to the district judges involved a copy of the minutes of the meeting whereby they were asked to consider anew and agree upon a division of business.

By letter of August 28, 1967, circulated among his colleagues (Motion to Advance, App.), Judge Chandler recounted the prior events in the controversy and charged that the Judicial Council's July request constituted another "illegal effort" to produce a situation wherein the Council could assert authority under 28

U.S.C. 137 to apportion the district court's business. He noted that his prayer for relief from this Court was still pending, and recommended that it would not be "proper to disturb the status quo while the case rests in the bosom of that Court."

On September 1, 1967 (Motion to Advance, App.), all of the district judges of the Western District of Oklahoma signed a letter addressed to the Judicial Council stating that "under the circumstances" the "current order for the division of business in this district is agreeable." The Tenth Circuit Judicial Council reconvened on September 14, 1967, took note of this unanimous certification by the district judges, and concluded that "no action of the Council is either necessary or appropriate at this time." The "Clerk of the Judicial Council" was directed to send a copy of the minutes to that effect to the Clerk of this Court, and the Clerk of the Court of Appeals for the Tenth Circuit did so under covering letter dated September 18, 1967.

4. There were no further developments until Judge Chandler filed a Motion to Advance in June 1969. It was in that posture that the Court, on June 16, 1969, while denying the motion to advance, set the cause for oral argument at the beginning of the 1969 Term.

## SUMMARY OF ARGUMENT

### I.

This Court has jurisdiction to entertain the petition for a writ of mandamus or prohibition.

At least when its orders are directed to a District Judge to regulate the exercise of his official duties, a Judicial Council is acting as a judicial tribunal for purposes of this Court's appellate jurisdiction under Article III of the Constitution. The judicial character of the councils established as Judicial Councils was an indispensable ingredient in their creation. A Judicial Council is no more and no less than the court of appeals for the particular circuit sitting *en banc*.

This Court possesses sufficient statutory authority to entertain the petition for an extraordinary remedy. Congress has not expressly provided for review of orders of Judicial Councils; and we are aware of no case holding that this Court has inherent power, apart from some statutory predicate, to review the actions of lower courts or tribunals. Examination of the history of the All Writs Act shows that it does provide a sufficient basis for this Court's exercise of appellate jurisdiction in a situation such as this. The actions which Judge Chandler protests sufficiently affect matters within this Court's appellate jurisdiction so as to bring his application for extraordinary relief within the All Writs Act.

## II.

In the present posture of the case, the petitioner is not entitled to any relief. The initial order of the Council which evoked his recourse to this Court was long ago vacated and has been replaced by orders clearly within the Council's authority.

The assignment order currently in effect is within the lawful authority of the Judicial Council. That order rests on both 28 U.S.C. 137 and 332. These statutory provisions were carefully prepared and enacted by Congress on the recommendation of the Judicial Conference of the United States, for the purpose of assisting the judges to keep their own house in order. These provisions are valid congressional responses to the need for the federal courts to maintain themselves as effective and trustworthy instruments of justice.

## ARGUMENT

### I. THIS COURT HAS JURISDICTION TO ENTERTAIN THE PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION

The threshold question that must be considered is whether this Court possesses the potential capacity under Article III of the Constitution to entertain Judge Chandler's direct application for extraordinary relief from the determinations by the Judicial Council of the Tenth Circuit. If so, the jurisdictional inquiry must decide whether specific statutory authority is necessary for the exercise of such power and whether such authority presently exists. Both branches of this inquiry will illustrate that the Court's jurisdiction over this matter is far from clear, but it is the position of the United States that the Court does possess the requisite jurisdiction to pass upon Judge Chandler's contentions.

A. AT LEAST WHEN ITS ORDERS ARE DIRECTED TO A DISTRICT JUDGE TO REGULATE THE EXERCSE OF HIS OFFICIAL DUTIES, A JUDICIAL COUNCIL IS ACTING AS A JUDICIAL TRIBUNAL FOR PURPOSES OF THIS COURT'S APPELLATE JURISDICTION UNDER ARTICLE III OF THE CONSTITUTION

In dissenting from the denial of Judge Chandler's application for a stay of the Judicial Council's order of December 13, 1965, two members of this Court characterized the Council as simply a "governmental agency" entrusted only "with limited *administrative* powers." 382 U.S. 1003, 1005 (emphasis in original). If that characterization is accurate, this Court has no jurisdiction under the Constitution to pass upon Judge Chandler's petition. No further authority would be needed to sustain this conclusion than *Marbury* v. *Madison,* 1 Cranch 137.

In *Marbury,* it will be remembered, the petitioner had been appointed a justice of the peace in the District of Columbia, but the new Administration refused to deliver to him his previously signed commission. Applying directly to this Court for a writ of mandamus to compel the Secretary of State to deliver the commission, Marbury invoked Section 13 of the Judiciary Act of 1789 which by its terms conferred on this Court (and only on this Court) the "power to issue * * * writs of *mandamus,* in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." Chief Justice Marshall's classic opinion concluded, however, that insofar as this statute sought to confer power to entertain proceedings against federal *officers* in the first instance, it was

void as inconsistent with the command of Article III that, except in a few defined situations, this Court's jurisdiction is in "all other cases" to be appellate.

But Marshall was quite careful to note that in regulating the Court's *appellate* jurisdiction, Congress could provide any mode it chose for the Court to exercise whatever aspects of its potential "appellate" jurisdiction Congress elected to authorize. What was viewed as critical, the opinion makes clear, is not the form of action, but whether in substance it is the beginning of a *new* lawsuit brought to the courts for the first time or is instead the continuation of a judicial controversy—including an application for *de novo* reexamination of what a lower court has done. Marshall's analysis is pertinent here (1 Cranch at 175-176):

> To enable this court, then, to issue a *mandamus*, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them [sic] to exercise appellate jurisdiction. * * * It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a *mandamus* may be directed to courts, yet to issue such a writ to an officer, for the delivery of a paper, is, in effect, the same as to sustain an original action for that paper, and therefore, seems not to belong to appellate, but to original jurisdiction.

As the Court later explained in awarding a writ of mandamus, the authority conferred by the First Judiciary Act to issue writs of mandamus to inferior *courts* of the United States *is* a manifestation of "appellate" power because in such circumstances the writ "is for the purpose of revising and correcting proceedings in a case already instituted in the court * * *." *In re Winn,* 213 U.S. 458, 465–466. See, also *Ex parte Crane,* 5 Pet. 190, 193 (Marshall, C. J.); *Ex parte Yerger,* 8 Wall. 85, 103; *Maryland* v. *Soper* (*No. 1*), 270 U.S. 9, 28; *Ex parte Republic of Peru,* 318 U.S. 578, 582–583.

The key question, therefore, is whether a judicial council is, for these purposes, a "lower court" or "inferior tribunal" whose decisions are reviewable in the exercise of this Court's appellate jurisdiction, rather than an administrative agency whose personnel happen also to serve as circuit judges. In our view, at least insofar as a Council is acting to direct the conduct of judicial business by district judges, it is functioning both in form and in substance as a judicial tribunal within the compass of Article III.

No extended discussion of the powers and functions of a Judicial Council is necessary at this juncture, since that subject must be developed fully below in connection with the examination of what the Tenth Circuit Judicial Council has done in this matter. It should be sufficient to note that the judicial character of the councils bearing that description was an indispensible ingredient in their creation. The entity known as a "Judicial Council" was created by Section 302 of

the Act of August 7, 1939, 53 Stat. 1223, relating as a whole to the "Administration of the United States Courts." That act created the Administrative Office of the United States Courts, as part of the judicial branch, to provide support services for the courts and to collect, analyze, and disseminate to them statistics on judicial administration. See 28 U.S.C. 601, 604. But the Director of the Administrative Office, who is appointed by this Court, was entrusted with no authority over the performance of judicial business. For this purpose the Act created the judicial councils, with the responsibility for considering his reports on the dispatch of judicial business and with the power to make determinations, binding on district judges, for resolution of any impediments to proper court functioning.

A judicial council is no more and no less than the court of appeals for the particular circuit sitting *en banc*. Compare 28 U.S.C. 332 with F.R. App. P., Rule 35(a). See Shafroth, *Modern Developments in Judicial Administration,* 12 Am. U.L. Rev. 150, 157 (1963); (Henry P.) Chandler, *Some Major Advances in the Federal Judicial System,* 31 F.R.D. 307, 384 (1963). The decision to "center the responsibility [for judicial administration] upon the personnel who constitute the Circuit Court of Appeals" [5] was made to place "the responsibility for judicial administration where it be-

[5] *Hearings on Administration of United States Courts before the House Judiciary Committee*, 76th Cong., 1st Sess., 21 (1939) (hereafter, *House Hearings*).

longs—with the judiciary * * *."[6] Chief Justice Groner of the United States Court of Appeals for the District of Columbia, who had been appointed by Chief Justice Charles Evans Hughes as chairman of the committee of circuit judges that took an active part in drafting the bill, explained to the Senate Committee that no "administrative officer" was given "any supervision or control over the exercise of purely judicial duties":[7]

> To create such [an] office would be to destroy the very fundamentals of our theory of government. The administrative officer proposed in this bill is purely an administrative officer. * * * It is his duty to observe and see that whatever is wrong in the administration of justice, from whatever sources it may arise, *is brought to the attention of the judicial council that it may be corrected, by the courts themselves.* That is, as I respectfully suggest, as it ought to be.[8]

The bill as originally enacted made it the duty of district judges to comply with the "directives" of the Council, and in the 1948 Revision of the Judicial Code a change in "phraseology" amended this mandatory language to provide that "district judges shall

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[6] H. Rep. No. 702, 76th Cong., 1st Sess., p. 4 (1939).

[7] *Hearings on Administration of United States Courts Before a Subcommittee of the Senate Judiciary Committee*, 76th Cong., 1st Sess., p. 12 (1939) (hereafter *Senate Hearings*) (question by Senator Hatch).

[8] *Senate Hearings*, pp. 12–13 (emphasis added). See, also, S. Rep. No. 426, 76th Cong., 1st Sess., p. 4 (1939).

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promptly carry into effect all *orders* of the judicial council." 28 U.S.C. 332 (emphasis added). The substance of what judicial councils are indisputely authorized to do—in some manner "direct" or "order" district judges to carry out certain measures—demonstrates, as the legislative history shows Congress understood, that the councils were regarded, consonant with traditional notions of separation of powers, as judicial entities.[9]

Review of such "orders" or "directives" comports with the dual limitations that this Court pass only upon "cases or controversies," within its "appellate jurisdiction". This is so at least where, as in this case, the orders have the purpose and effect of limiting a district judge's performance of judicial duties and he alleges illegal interference with the exercise of his office. Direct judicial supervision of the efficiency and responsibility with which a subordinate judge performs his duties can be analogized to a disbarment proceeding or order for purposes of the constitutional reference to "cases" and "controversies",[10] since in both instances a tribunal is controlling the individual's authority to participate in the judicial process. Similarly, this Court has often held that it can issue writs of mandamus in the exercise of its appellate jurisdiction to review and revise the action of inferior

[9] Courts of appeals, as courts, exercise a variety of functions other than hearing appeals from district courts and administrative agencies. See *Textile Mills Securities Corp.* v. *Commissioner of Internal Revenue*, 314 U.S. 326, 332.

[10] See Note, *The Exclusiveness of the Impeachment Power Under the Constitution*, 51 Harv. L. Rev. 330, 334 (1937).

federal courts disbarring an attorney. See, *e.g.*, *Ex parte Bradley*, 7 Wall. 364; *Ex parte Robinson*, 19 Wall. 505; *Ex parte Wall*, 107 U.S. 265.

Thus, assuming that a Judicial Council—generally, or at least when issuing orders regulating the official activities of district judges—is a "lower court" or "inferior tribunal" within the meaning of *Marbury* v. *Madison* and later cases, this Court has the constitutional capacity to entertain Judge Chandler's petition in the exercise of its appellate jurisdiction.

B. THIS COURT POSSESSES SUFFICIENT STATUTORY AUTHORITY TO ENTERTAIN THIS PETITION FOR AN EXTRAORDINARY REMEDY

The somewhat more questionable aspect of this Court's jurisdiction to hear Judge Chandler's prayer for relief involves the search for statutory authority to exercise what we believe we have shown is the potential appellate jurisdiction allowed by Article III. The clause of Article III conferring appellate jurisdiction subject to regulation by Congress has always been understood to mean that the exercise of jurisdiction generally permitted to this Court by the Constitution is dependent upon some affirmative legislative action authorizing it. Thus, whatever the mode of asserting appellate jurisdiction that a litigant may invoke—including mandamus—relief can be granted only when statutory authority for entertaining the suit can be found. Compare *In re Winn*, 213 U.S. 458, 466, with *In re Green*, 141 U.S. 325, 326–327. See, also, *Stephan* v. *United States*, 319 U.S. 423, 426; *Carroll* v. *United States*, 354 U.S. 394, 399.

In his Motion for Leave to File, Judge Chandler invokes as a premise for jurisdiction not only the All Writs Act, 28 U.S.C. 1651(a), but also calls upon "the Court's inherent powers" (p. 4). We are aware of no case holding that this Court has "inherent power", apart from some statutory predicate, to review the action of lower courts. Congress has not expressly provided for review of the orders of Judicial Councils.[11] And the extent to which the All Writs Act furnishes necessary statutory support for jurisdiction is unclear, because in all prior cases, including those cited by petitioner,[12] in which this Court has relied on that statute to issue an extraordinary writ "in aid of its jurisdiction", what was involved was a *particular* lawsuit that would otherwise have come within the Court's statutory review jurisdiction, although at a later stage. By contrast, Judge Chandler bases his reliance upon this statute on the theory that the action of the Judicial Council "touches, through Judge Chandler's fate, hundreds of cases over which this Court has appellate or review jurisdiction." (Pet. 13) To test the permissibility of this expansive use of the All Writs Act, we believe it would be useful to con-

[11] When Congress created a hybrid "judicial panel on multidistrict litigation," composed of seven circuit and district judges, to coordinate similar suits filed in different districts, it expressly addressed itself to the question of further review, and authorized review by the court of appeals of the transferee district under the All Writs Act. See 28 U.S.C. (Supp. IV) 1407 (d) and (e).

[12] *United States Alkali Export Ass'n, Inc.* v. *United States*, 325 U.S. 196; *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212 (both cases: common law writs of certiorari in antitrust cases over which this Court had exclusive direct appellate jurisdiction after final judgment).

duct a brief analysis of the historical development of this Court's power to issue extraordinary writs.

In 1789, the First Judiciary Act was passed, and it contained two distinct sections dealing with the issuance of extraordinary writs, Sections 13 and 14, 1 Stat. 80–82. Section 13, which was involved in *Marbury* v. *Madison,* conferred upon this Court, and only on this Court, the "power to issue * * * writs of *mandamus,* in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." In light of the historical antecedents of that statute and its interpretation in subsequent decisions, we would have no doubt that it encompassed the type of review for which Chandler presses—but it may have been effectively repealed.

*In Ex parte Crane,* Chief Justice Marshall, after pointing to Section 13, explained that under a comparable New York statute the state court (5 Pet. at 194):

> possesses the power to issue this writ [of mandamus], in virtue of its general superintendance of inferior tribunals. No other tribunal exists by which it can be exercised.

The responsibility entrusted and accepted was clearly patterned on the "supervisory authority" exercised by the Court of King's Bench in England over the conduct of inferior courts and judges.[13] As Chief Judge Magruder noted after analyzing the experience

[13] See Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution,* 28 Mich. L. Rev. 723, 731 (1930).

judiciary act confers the power expressly on this court.

under Section 13 (*In re Josephson,* 218 F. 2d 174, 178 (C.A. 1)):

> After *Marbury* v. *Madison,* the Supreme Court continued to recognize that * * * Section 13 of the Judiciary Act of 1789 was still good to authorize that Court to exercise the essentially appellate function of reviewing and revising a judicial proceeding in a lower court by appropriate use of the common-law writ of mandamus, whether or not it had been given by Congress some other statutory appellate jurisdiction, or potential appellate jurisdiction, by way of an appeal or writ of error or otherwise. * * *

See, *e.g., Virginia* v. *Rives,* 100 U.S. 313, 323–324; *Maryland* v. *Soper* (*No. 1*), 270 U.S. 9, 30; *In re National Labor Relations Board,* 304 U.S. 486, 496.

Section 14 of the Judiciary Act of 1789, by contrast, is the predecessor of the All Writs Act, and was distinctly viewed as an ancillary provision designed to supplement the fulfillment of separately conferred jurisdiction by providing an open-ended category of remedies; it provided that this Court *and other* Federal courts were to have:

> power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

Sections 13 and 14 of the First Judiciary Act retained their independent identity over the years[14] until the revision of the Judicial Code in 1948. At that time, they were repealed in favor of the All Writs Act, 28 U.S.C. 1651(a), which, it was said by the Reviser, "consolidates" the sections. Nevertheless, because the note also explained that the "special provisions" that had been carried forward from Section 13 "were omitted as unnecessary in view of the revised section," there has been some interpretation indicating that this change was meant to, and did, withdraw the unique supervisory power which had theretofore been entrusted to this Court alone, so that thenceforth, this Court, as will all other federal courts, may issue only those extraordinary writs that may be "necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Judge Magruder in the *Josephson* case *supra,* 218 F. 2d at 179, noting that the Reviser's Note termed this Court's special statutory power "unnecessary" in light of the clarification of the "all-writs" provision as extending to *all* federal courts, concluded:

> Thus, it seems that since 1948 Congress has withdrawn from the Supreme Court its special appellate power to supervise proceedings in the lower federal courts by means of the writ of mandamus; so that all federal courts, including the Supreme Court, are now limited to the is-

[14] They were codified respectively as Rev. Stat. §§ 688 and 751 and then as Sections 234 and 262 of the Judicial Code of 1911 (28 U.S.C. (1940 ed.) 342 and 377).

> suance of "all writs necessary or appropriate in aid of their respective jurisdictions."

Apparently accepting this analysis, Justice Brennan's dissenting opinion (joined by Justices Frankfurter, Burton, and Harlan) in *La Buy* v. *Howes Leather Company,* 352 U.S. 249, 260, 265–266, argued that the Court's pre-1948 opinions supporting the issuance by this Court of writs of mandamus to lower courts could not fairly be relied on as suggesting similar authority for courts of appeals to proceed under the All Writs Act; Section 13, the dissent pointed out,

> unlike the All Writs Act, *was* not restricted in its use to aiding the jurisdiction of the appellate court, and therefore might be deemed *to have granted* a broader power to this Court than that conferred on the Courts of Appeals by the latter statute. [Emphasis added.] [15]

While Congress undoubtedly had the power to cut back on this Court's appellate jurisdiction, we believe that such an intention should not lightly be inferred. Compare *Carroll* v. *United States,* 354 U.S. 394, 411–415; *Stephan* v. *United States,* 319 U.S. 423, 426; *Ex parte McCardle,* 7 Wall. 506, 512. The relevant material surrounding the 1948 codification is quite consistent with the conclusion that the special power conferred by Section 13 in 1789 is now simply merged with the authority that all federal courts, including this Court, possess to issue writs in aid of their jurisdiction. The Reviser's Note explains that the new Section 1651(a) makes "explicit the right to exercise

[15] This point was not discussed by the majority.

powers implied from the creation of such courts." This Court, specifically created by Article III of the Constitution to be "supreme", may properly conclude that the explicit authority uniquely conferred by Congress in 1789 in light of its special status was not withdrawn either deliberately or accidentally in 1948.

A number of sound principles support this conclusion. First, it is a fundamental principle of Anglo-American law, recognized by this Court at least as long ago as *Marbury* v. *Madison,* that every right demands a remedy; in *Marbury,* for example, the Court concluded that the office of justice of the peace, a position of trust, honor, and profit, surely had to be subject to the protection of the law. See 1 Cranch at 163. Second, Judge Chandler, who asserts that the Judicial Council has illegally exceeded its bounds by interfering with the exercise of his judicial office, has undoubtedly selected the proper remedy, a writ in the nature of mandamus. Mandamus is the proper remedy

> when the case is outside of the exercise of this [judicial] discretion, and outside the jurisdiction of the court * * * to which * * * the writ is addressed. One of its peculiar and more common uses is to restrain inferior courts and to keep them within their lawful bounds. [*Virginia* v. *Rives,* 100 U.S. 313, 323–324.]

Accord, *Ex parte Republic of Peru,* 318 U.S. 578, 582–583. This concept extends to use of a writ of mandamus, either issued by this Court, *e.g., Ex parte Robinson,* 19 Wall. 505, 512; *Ex parte Bradley,* 7 Wall. 364, 375–376, or by an intermediate appellate court,

*e.g., Laughlin* v. *Wheat,* 95 F. 2d 101 (C.A. D.C.), as the proper remedy for reviewing the action of a court in disciplining an attorney or conditioning the exercise of his office.

But if Judge Chandler cannot resort to this Court for scrutiny of what he contends were the lawless excesses of the Judicial Council, he will be without any practical remedy. It requires no extended discussion to point out that no serious or appropriate remedy could be sought from the district court or from the court of appeals itself.[16] While it is axiomatic that necessity cannot create jurisdiction, *Ex parte Republic of Peru, supra,* 318 U.S. at 583–584 n. 3, cf. *Will* v. *United States,* 389 U.S. 90, 97, this consequence can permissibly illuminate the inquiry whether Congress

[16] Apart from the anomolous conflict that would exist if a district judge were called upon to pass directly upon the lawfulness of the action of circuit judges, it is doubtful whether there are any statutes Judge Chandler could invoke to bring his grievances into a district court. The federal-question statute, 28 U.S.C. 1331, contains a jurisdictional-amount limitation; Judge Chandler's salary is unaffected by the Council's orders, and it is doubtful that he could assert or establish that the "matter in controversy" exceeds $10,000. Cf. *Stern* v. *South Chester Tube Company,* 390 U.S. 606. The district court mandamus statute, 28 U.S.C. 1361, extends to officers, employees, and agencies of the United States, but probably does not include other tribunals. There is no plausible basis for invoking an ancillary statute like the All Writs Act, since the relief would not be "in aid of" the district court's jurisdiction. The Declaratory Judgment Act, 28 U.S.C. 2201, applies only where the court would otherwise have jurisdiction over the matter. See *United States* v. *King,* 395 U.S. 1. And the Administrative Procedure Act, which is not generally thought to be an independent source of jurisdiction, excludes from the scope of the agencies to which it applies "the courts of the United States." 5 U.S.C. (Supp. IV) 551(1)(B).

has left a substantial lacuna in the statutory scheme for litigating substantial legal claims. See *Ex parte Bradley,* 7 Wall. 364, 376, holding that disbarment proceedings, which would not support a writ of error, were reviewable upon mandamus under Section 13 of the Judiciary Act because some flagrant abuses might otherwise go uncorrected. Mandamus, the Court explained, may be awarded directly "in the supervision of the proceedings of inferior courts, in cases where there is a legal right, without any existing legal remedy." *Ibid.*

The one case that research has uncovered bearing most directly on this point supports Judge Chandler's reliance upon the All Writs Act. In *United States* v. *Malmin,* 272 Fed. 785 (C.A. 3), the United States, as sovereign, filed with the Circuit Court of Appeals for the Third Circuit—which then as now (28 U.S.C. 42) had review jurisdiction over the federal courts in the Virgin Islands—a petition for a writ of mandamus to compel the respondent, a judge of the district court there, to return to the Virgin Islands to resume the exercise of his judicial office. The territorial governor had purported to replace Judge Malmin and the judge had acquiesced in the removal, which the United States believed was *ultra vires* and void. The government rested its application for the writ upon the predecessor to the All Writs Act; mandatory relief was sought in order that (272 Fed. at 788):

> the purposes of his appointment shall be fulfilled by the completion of cases formally begun before him and in order also that parties liti-

> gant may have their cases heard before the only judge warranted by law to hear and finally dispose of them, to the end that, if aggrieved by final judgments, they have had opportunity, under the laws of the United States, to apply to this appellate court for review of the same * * *.

The court agreed that it had authority under the statute to issue the writ "in aid of" its jurisdiction, explaining (272 Fed. at 792):

> The appellate jurisdiction of this court does not arise from prior invocation alone; it is continuously existent. Matters which disturb that jurisdiction, either before or after it is invoked, are, therefore, cognizable here. If the absence of a lawfully appointed judge of a District Court, from which appeals lie to this court, thereby affects the right of litigants to take appeals and the right of this court to entertain them, confessedly this court has power to restore the orderly proceedings of the trial court by commanding the absent judge to return and transact its business.

On the merits, the court agreed that the judge's removal was ineffective. "Therefore", the court explained, "it becomes essential to the appellate jurisdiction of this court that orderly proceedings in the District Court of the Virgin Islands be restored" (*ibid.*), and a peremptory writ of mandamus issued.

In the present case, it is the Judge himself who is complaining of illegal interference with the exercise of his office, and his interest supplements those of the litigants before the district court in demonstrating that the actions which Judge Chandler protests suffi-

ciently affect matters within this Court's appellate jurisdiction so as to bring his application for extraordinary relief within the All Writs Act. This conclusion is reenforced by the now settled understanding that an extraordinary writ may be issued when the lower court's action or inaction might defeat this Court's *eventual* jurisdiction, which could be invoked on the merits only after proceedings in an intermediate court.[17]

II. IN THE PRESENT POSTURE OF THE CASE, PETITIONER IS NOT ENTITLED TO ANY RELIEF

If the Court concludes that it has jurisdiction to entertain Judge Chandler's application for extraordinary relief from the orders issued by the Judicial Council, he has failed to make out a case on the merits for the award of such relief. The initial order of the Council which evoked his recourse to this Court was long ago vacated and has been replaced by orders clearly within the Council's authority.

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[17] See, *e.g.*, *McClellan* v. *Carland*, 217 U.S. 268 (mandamus); ***Ex parte United States*, 287 U.S. 241 (mandamus)**; *Ex parte Republic of Peru*, 318 U.S. 578 (mandamus and prohibition); *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212 (common-law certiorari); cf. *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597 (injunction); *Roche* v. *Evaporated Milk Association*, 319 U.S. 21 (mandamus). These cases have limited or overruled the earlier position taken in such cases as *In re Massachusetts*, 197 U.S. 482, 488, and *In re Glaser*, 198 U.S. 171, 173, which had held that resort could be made to this Court for a writ "in aid of" its jurisdiction only when it had direct review jurisdiction over the court wherein the case was then pending.

A. THE FIRST ORDER ENTERED BY THE JUDICIAL COUNCIL, EVEN IF OBJECTIONABLE, HAS BEEN REVOKED

Judge Chandler submitted his prayer for relief shortly after he was notified that on December 13, 1965, the Judicial Council of the Tenth Circuit in closed session had prepared an order directing him to take no further part in any case or proceeding then or thereafter pending in the District Court for the Western District of Oklahoma, where he served as Chief Judge. That order, which was entered without any notice or opportunity to be heard, was based on the Council's own prior discussions of the conduct of business in that district and Judge Chandler's apparently adverse effect on it; the order also, however, recited that he had himself been a party defendant in civil and criminal litigation, including disqualification proceedings, and that the Council was convinced from all these circumstances that he was "presently unable, or unwilling, to discharge efficiently the duties of his office" (Pet. App. ii).

Judge Chandler argues that this action constituted removal from the bench, and contends that Section 332 of the Judicial Code, on which the Council had relied, does not purport to confer such power, but that if it does the statute would be unconstitutional.

In dissenting from the denial of a stay of that order, Justices Black and Douglas expressed their opinion that no statute could constitutionally authorize the circuit judges, or a Judicial Council, to "inquire into the fitness of a district judge to hold his office"; to do so, they argued, would trench upon the constitutional

responsibility of Congress under Article I, §§ 2 and 3, and Article II, §4, to exercise the power to impeach malfeasant federal officers, including federal judges. In our view, however, the Constitution would not forbid such legislation, providing for judicial trial of the fulfillment of the condition of federal judicial tenure under Article III—that the judge maintain his "good behavior." The power of impeachment—which applies to *all* federal officers, not only to federal judges—is not defined in Article III but rather embodies the sole method by which the *legislature* may *directly* remove government officials—to the exclusion, for example, of the English practice of passing bills of attainder. Thus, just as the impeachment clause does not prevent the President from removing executive officers in his own discretion, even though they are also subject to removal by Congress through impeachment, *Myers* v. *United States,* 272 U.S. 52, so also there is nothing in the Constitution to suggest that Congress cannot, consistently with the separation of powers, provide procedures by which the courts could try the right of a judge to continue to hold office. Compare *Humphrey's Executor* v. *United States,* 295 U.S. 602.[18]

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[18] See *Ex parte Wall*, 107 U.S. 265, 288:

> [T]he courts ought not to hesitate * * * to protect themselves from scandal and contempt, and the public from prejudice, by removing grossly improper persons from participation in the administration of the laws.

It is noteworthy that Article II, § 2, cl. 2 of the Constitution expressly authorizes Congress to entrust to "the Courts of Law" the power to appoint federal officers. See, generally, *Ex parte Siebold*, 100 U.S. 371; *Hobson* v. *Hansen*, 265 F. Supp. 902,

Nothing in this position is inconsistent with the bedrock principle of our constitutional system: the independence of the federal judiciary. The Constitution states only that federal judges shall hold office during their good behavior; necessarily implicit in this provision is that the official conduct of judges is subject to supervision and control by appropriate agencies. The first Congress in 1790 provided an alternative to impeachment for removal of federal judges: discretionary disqualification from office as part of the judgment of conviction for accepting a bribe. Act of April 30, 1790, § 21, 1 Stat. 117 (now codified as 18 U.S.C. 201 (e)). Compare 18 U.S.C. 203(b) (mandatory disqualification). Manifestly, the hierarchical judicial system contemplated by the Constitution assumes that judges of "inferior courts" are subject to the supervision and control of superior courts and are accountable to them for the performance of their duties. See, *e.g.*, *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259–260; *ACF Industries, Inc.* v. *Guinn*, 384 F. 2d 15, 20 (C.A. 5), certiorari denied, 390 U.S. 949 (mandamus may be used to exert "supervisory control" by courts of appeals over district courts). This relationship extends beyond mere review of rulings on questions of law,

911–915 (D. D.C.) (three-judge court), certiorari dismissed pursuant to Rule 60, 393 U.S. 801. This clause provides clear and direct authority for Congressionally authorized appointment of federal judges by federal judges, see Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 Mich. L. Rev. 485 (1930), a function which would necessarily carry with it implied authority to determine when the Judge should be removed, see *Matter of Hennen*, 13 Pet. 230.

and also authorizes the appellate court to pass upon the propriety and fairness of the district judge's determination that he harbored no personal bias against a litigant and possessed no personal interest in the outcome of the litigation. See 28 U.S.C. 144, 455. Indeed, on two occasions writs of mandamus have been issued against Judge Chandler himself ordering him to take no further part in cases pending before him, and in both instances this Court denied his petitions for certiorari. See *Texaco, Inc.* v. *Chandler,* 354 F. 2d 655 (C.A. 10) (*en banc*), certiorari denied, 383 U.S. 936 (relationship to counsel); *Occidental Petroleum Corp.* v. *Chandler,* 303 F. 2d 55 (C.A. 10) (*en banc*), certiorari denied, 372 U.S. 915 (personal bias).[19] It was, no doubt, in this tradition that the Judicial Conference of the United States on June 10, 1969, adopted and promulgated a prophylactic resolution limiting the outside activities of federal judges, subject to review and exception by the relevant circuit judicial councils.

There has been general agreement from the earliest times that Congress could constitutionally provide alternative procedures to impeachment, particularly judicial trials or hearings, for determining whether federal judges have abided by the requirement of good behavior.[20] And the proposed Judicial Reform Act,

[19] See, also, *United States* v. *Ritter*, 273 F. 2d 30, 32 (C.A. 10), certiorari denied, 362 U.S. 946; *Gladstein* v. *McLaughlin*, 230 F. 2d 762 (C.A. 9).

[20] See 3 Hinds, *Precedents of the House of Representatives*, p. 982, American State Papers (Misc.), Vol. I, p. 151; Annals of Congress, 4th Cong., 2d Sess., col. 2320; Annals of Congress, 7th Cong., 1st Sess., cols. 71–72; 81 Cong. Rec. 6164; H. Rep. No.

now pending before Congress, would create a Commission composed of judges assigned by the Chief Justice with power to make an effective recommendation to the President, if its judgment is sustained by this Court on review, that a judge be removed for disability or conduct inconsistent with good behavior. S. 1506, 91st Cong. See, generally, *Hearings on S. 1506 before the Senate Judiciary Subcommittee on Improvements in Judicial Machinery,* 91st Cong., 1st Sess. (held in June 1969; to be available in September).[21]

This case, however, does not appropriately raise for this Court's ultimate decision the question whether judicial panels may validly be authorized to discipline and, if necessary, to remove federal judges. All authorities agree that any such procedures would have

921, 77th Cong., 1st Sess.; H. Rep. No. 814, 75th Cong., 1st Sess.; Sumners, *Bill H.R. 146*, 13 Pa. Bar Ass'n Quar. 150 (1942). The initial and most thorough examination of the question was done by Professor Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 Mich. L. Rev. 870 (1930). See, also, Moore, *Judicial Trial and Removal of Federal Judges*, 20 Texas L. Rev. 352 (1942); Ross, *"Good Behavior" of Federal Judges*, 12 Kansas City L. Rev. 119 (1944); Note, *The Exclusiveness of the Impeachment Power under the Constitution*, 51 Harv. L. Rev. 330 (1937); Note, 22 Mass. L. Quar. 52 (July–Sep., 1937); Note, *Trial of Good Behavior of Federal Judges*, 29 Va. L. Rev. 876 (1943). But see Otis, *A Proposed Tribunal: Is It Constitutional?* 7 Kansas City L. Rev. 3 (1938); Brown, *The Impeachment of the Federal Judiciary*, 26 Harv. L. Rev. 684 694–695 (1913); *Clark* v. *United States*, 109 Ct. Cl. 444, 459, certiorari denied, 333 U.S. 833.

[21] See, also, *Hearings on The Judicial Reform Act, S. 3055 etc., Before the Senate Subcommittee on Improvements in Judicial Machinery*, Committee on the Judiciary, 90th Cong., 2d Sess. (1968).

to comport with the due-process requirements of advance notice of the charges and an opportunity to defend against them. When it entered its order of December 13, 1965, removing Judge Chandler from any further participation in judicial activities, the Judicial Council of the Tenth Circuit recited that it had been discussing his attitude and conduct for several years, observed that he had been a defendent in civil and criminal litigation, and noted that he had twice been the subject of mandamus proceedings to order him disqualified from continued participation in particular cases (Pet. App. ii). This order, however, was issued *ex parte,* without notice or hearing; and in our view neither the fact that the judges who comprise the Judicial Council had been reviewing the records in Judge Chandler's cases for years, nor the fact that in one of the mandamus actions (*Occidental Petroleum Corp.* v. *Chandler, supra,* 303 F. 2d at 57) the full court had conducted three days of factual hearings before sustaining the charge of bias, suffices to excuse the deficiencies in fair procedure.[22] At least in the absence of the most compelling showing that the fundamental integrity of the judicial process demands such action, no tribunal can be allowed by summary, *ex parte* procedures to assert non-feasance or misfeasance and to strip a federal judge of the incidents of his office. Cf. *Ex parte Robinson,* 19 Wall. 505, 512; compare *Ex parte Wall,* 107 U.S. 265, 271, 289–290.

[22] See *Hearings on the Judicial Reform Act, S. 3055, supra,* note 21, pp. 18, 38–39, 249–255; Tydings, *The Congress and the Courts: Helping the Judiciary to Help Itself,* 52 A.B.A.J. 321, 323 (1966).

Even if the order is to be "purely interlocutory," elementary standards of fairness dictate that such drastic action can not be taken unless grave consequences would surely follow from even the briefest delay. Cf. *Laughlin* v. *Wheat,* 95 2d 101, 102 (C.A. D.C.); see, also *Sniadach* v. *Family Finance Corp. of Bay View,* 395 U.S. 337.

But whether or not 28 U.S.C. 332 can constitutionally be construed to authorize divesting a federal judge of further duties, and even if it be assumed that the procedures followed by the Tenth Circuit Judicial Council in entering the December 13 order were inconsistent with due process, Judge Chandler would not be entitled to a writ of mandamus. The December 13 order was to be effective "until the further order of the Judicial Council" (Pet. App. ii). But when neither Judge Chandler nor any other judge indicated a willingness to attend the hearing subsequently scheduled for February 10, 1966, the Council reconvened on February 4 and entered a new order—expressly superseding the order of December 13—by which Judge Chandler was restored to the authority to hear and determine (pending) cases. Thus, since that first order, which impelled Judge Chandler to resort to this Court for relief, has long since been annulled by the action of the Judicial Council itself, it is both unnecessary and inappropriate, on an application for an extraordinary remedy, for the Court to discuss the difficult and delicate statutory and constitutional issues it posed. It is a fair prediction, we believe, that a recurrence of such an incident is highly unlikely.

B. THE ASSIGNMENT ORDER CURRENTLY IN EFFECT IS WITHIN THE LAWFUL AUTHORITY OF THE JUDICIAL COUNCIL

The order of the Judicial Council that is presently in force as effecting an assignment of business within the Western District of Oklahoma was entered on February 4, 1966 (Resp. Mem. pp. 10–16). That order, which is rested on the Council's authority under both 28 U.S.C. 137 and 332, restored to Judge Chandler all civil, bankruptcy, and criminal cases assigned to him prior to December 28, 1965, the date on which the Clerk of the District Court filed the Council's December 13 order. The present order also apportions new business, on a defined basis, among the other judges of the district. It is the view of the United States that this order is both substantively and procedurally valid.

Whether the order could have been issued under Section 137 alone, it is unnecessary to decide. That section authorizes and directs the judicial council for a circuit to make "necessary orders" for the division of business and assignment of cases in the event the judges of a multi-judge district cannot agree among themselves on these questions. In this capacity, judicial councils are entrusted with the power originally conferred upon the senior circuit judge—now called the chief judge of the circuit—by Section 23 of the Judicial Code of 1911, 36 Stat. 1090, 28 U.S.C. 27 (1940 ed.).

The power conferred by Section 137 extends to making binding, mandatory divisions not variable by the district judges affected, although the order may, as in this case, provide that it is subject to amendment

or modification upon the accord of the district judges. Compare *Ex parte Briggs,* 15 F. 2d 84, 87 (Van Valkenburgh, J., at chambers in St. Paul, Minnesota), with *Case* v. *United States,* 14 F. 2d 510, 513 (C.A. 8). Judge Chandler, however, disputes the relevance of this section because he claims there was no disagreement among the district judges within the meaning of the statute, since they disagreed only as to the disposition of matters theretofore assigned (to him), a category of business he argues is not encompassed by the statute. Neither the language of the original legislation in 1911 nor its present form provides much indication of congressional intent on this question. While there is some force to Judge Chandler's position that the statute was probably not concerned with disagreement over the division of work that has *already* been assigned, the question need not be resolved here. (The Judicial Council's interpretation, that on these facts a disagreement did exist, is also reasonable and is entitled to considerable weight.) It is unnecessary to pass upon Judge Chandler's proposed construction of Section 137 because the Council's outstanding order did not affect previously assigned cases; instead, as Judge Chandler insisted, it left them to him. Cases filed after December 28, 1965, were apportioned among the other district judges, an arrangement in which all judges, including Judge Chandler, expressly concurred. Whether under the circumstances the Council had authority to fix definite ratios for the assignment of future cases is a matter in which Judge Chandler, as distinguished from his brethren, has no litigable interest. And since the Council's order (Resp. Mem. p. 13)

explicitly authorizes the district judges to alter the arrangement by written agreement, it is difficult to see how anyone can complain of the order. Indeed, when, in July, 1967, the Council invited the district judges to consider whether they wished to modify the assignment designations, the judges unanimously expressed the view that the present system is satisfactory.

Supplementing the Council's authority to act under 28 U.S.C. 137 is its power under 28 U.S.C. 332 to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." That statute, in our view, is independently sufficient to sustain the Council's February 4 order directing Judge Chandler to dispose of his backlog of some 160 cases before certifying, as it was subsequently explained, that he is willing and able to undertake new assignments. Indeed such an order has been one of the more customary types of action taken by the various judicial councils under this section. See Shafroth, *Modern Developments in Judicial Administration,* 12 Am. U. L. Rev. 150, 160 (1963).

Although Judge Chandler has sought to characterize Section 332 as simply a "housekeeping" statute (Reply to Suggestion of Mootness, p. 5), this contention overlooks the deliberately broad responsibilities and powers Congress conferred on circuit judicial councils when it created them in 1939. True, one of the principal problems the councils were expected to deal with was the problem of the tardy trial judge who

failed to respond to informal exhortations.[23] For this reason the statute, which was in large measure the brainchild of Chief Justice Hughes and other Justices of this Court,[24] made it the express duty of the judge to carry out the "directions" or "orders" of the judicial council. See S. Rep. No. 426, 76th Cong., 1st Sess., p. 3 (1939); *House Hearings, supra,* pp. 13 (Chief Justice Groner), 21 (Judge John T. Parker); *Senate Hearings, supra,* pp. 11, 14 (Chief Justice Groner), 16, 18 (Arthur T. Vanderbilt), 34 (Alexander Holtzoff).

But the language of the statute is not limited to the mere abatement of delays in dispatching business, and the legislative history confirms that Section 332 should not be so narrowly construed.[25] Thus, Chief Justice Groner of the United States Court of Appeals for the District of Columbia, who was the Chairman of the Committee of the Judicial Conference of the United States that drafted the legislation, explained in the

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[23] In his biographical study of *William Howard Taft: Chief Justice* (1965), Alpheus Thomas Mason quotes a letter in which the late Chief Justice "helplessly" implored a district judge to dispose of a case pending before him for four years (p. 191):

> Of course I write this letter with no assumption that I may exercise direct authority over you in the discharge of your duties, but as head of the Federal judiciary I feel I do have to appeal to you, in its interest and in the interest of the public whom it is created to serve, to end this indefinite situation.

[24] See, generally, Chandler, *Some Major Advances in the Federal Judicial System*, 31 F.R.D. 307, 383–392 (1963).

[25] See *Jimenez* v. *Aristeguieta*, 311 F. 2d 547, 554 (C.A. 5), certiorari denied, 373 U.S. 914.

*Senate Hearings, supra,* p. 11, after noting the problems of delay:

> Those matters this bill undertakes to provide for by outlining certain duties of the judicial council. Under the present judicial set-up we have no authority to require a district judge to speed up his work or to admonish him that he is not bearing the full and fair burden that he is expected to bear, *or to take action as to any other matter which is the subject of criticism, or properly could be made the subject of criticism, for which he may be responsible.*
>
> The bill also provides what is not now true, that it shall be the duty of the district judges, when admonished or when matters are otherwise brought to his attention by the judicial council, *to take whatever steps are* thought to be necessary or *declared to be necessary to correct those things which ought to not exist in a well-run judicial system.* [Emphasis added.] [26]

Explaining the informational function to be served by the Director of the proposed Administrative Office, Chief Justice Groner later stated (*Senate Hearings,* pp. 12–13):

> It is his duty to observe and see that whatever is wrong in the administration of justice, from whatever sources it may arise, is brought to the attention of the judicial council that it may be corrected, by the courts themselves. * * *

And then again (*id.,* p. 14):

> I know that it may be said to be an acknowledgement by the courts of the necessity of which

[26] This part of the testimony was included in the Senate Report recommending passage of the bill. S. Rep. No. 426, *supra,* p. 3.

> I spoke in the beginning of my remarks, the duty and responsibility upon themselves of protecting themselves against the criticism or against those things which produce criticism. To that extent, it impinges upon what in the very beginning of things was considered to be the independence of the courts. At the present time a circuit judge or district judge is responsible to his conscience. This bill does impose some sort of instrumentality whereby, if his conscience is not sufficiently quickened, it may be quickened by some action on the part of the judicial council.
>
> It is not, I think, an unfair or an unwise impingement on the independence of the courts. I think the very necessities of the work, the strengthening of confidence on the part of the people is the first essential, and anything which properly provides for and leads to the accomplishment of that purpose, I am for. * * *

Before the House he explained that the mandatory nature of the Council's authority would be consistent with the traditional independence of the courts (*House Hearings, supra*, p. 16):

> I think, from the judges' standpoint, that is of primary importance; and give them a chance, as I said, perhaps brutally, to clean their own houses, and be certain that they have the confidence, which is the only asset that I know of that a judge has for sacrificing a professional career for a career on the bench—the confidence of the people will not be destroyed.

When Judge John J. Parker, Senior Judge of the Fourth Circuit, was asked whether the statute con-

tained "any restraint" on the authority of the council, he responded that the statute would have the widest scope practicable (*House Hearings,* p. 22):

> I do not think this bill does. Of course, I assume this is true: That the council will be restrained by the inherent limitations of the situation. They would know that, if they commanded a judge to do something, unnecessarily or unwisely, he would refuse to do it, and that would probably be the end of the matter.[27]

In light of these expansive statements, the Judicial Conference of the United States in 1961 adopted a report that rejects the narrow view of the power of judicial councils that Judge Chandler here puts forward. See *Report on the Powers and Responsibilities of the Judicial Councils,* H. Doc. No. 201, 87th Cong., 1st Sess. (1961). The report (p. 6) quotes the analysis reached by then Circuit Judge Warren E. Burger:

> These [last] two sentences of section 332 * * * are in general terms, but they are all-embracing and confer almost unlimited power. Any problem—whatever it may be—relating to the expeditious and effective administration of justice within the circuit is within the power of the circuit judicial council.

On the basis of the empirical evidence collected by the Judicial Conference Committee on the practical

[27] Arthur Vanderbilt explained to the Senate Committee that the bill had "teeth" in it because contumacious refusal to obey an order of a judicial council would be "perfectly just cause for the remedy and method of impeachment." *Senate Hearings,* p. 18. Chief Justice Groner expressed the same view to the House Committee. *House Hearings,* p. 14.

interpretation of Section 332 by the various judicial councils, the Report stated (p. 7):

> In other words, most of the councils appear, from the things with which they have dealt in these situations, to have recognized that their responsibilities and power extend, not merely to dealing with the questions of the handling and dispatching of a trial court's business in its technical sense, but also to dealing with the business of the judiciary in its broader or institutional sense, such as the preventing of any stigma, disrepute, or other element of loss of public confidence occurring as to the Federal courts or to the administration of justice by them, from any nature of action by an individual judge or a person attached to the courts.

The importance of the judicial councils in the administration of justice in the federal courts, the Report continued, is underscored by the variety of functions entrusted to councils by special statutes, including the authority, under 11 U.S.C. 62(b), to remove bankruptcy referees for cause (pp. 7–8).[28]

In concluding that Section 332 is entirely adequate as presently drafted for the judicial councils to perform supervisory functions beyond mere "housekeeping", the Report summarized (pp. 8–9):

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[28] See, also, Shafroth, *Modern Developments in Judicial Administration*, 12 Am. U. L. Rev. 150, 160 n. 18:

> A partial list of the statutes by which the judicial councils are given certain powers and duties include the following: 28 U.S.C. §§ 134 [authorize district judge to live outside his district], 137 [divide business among district judges in the absence of their agreement], 140(a) [authorize pretermission of session of court], * * * 294 [assign retired circuit or district judges to perform judicial duties], 295

On the basis of the foregoing, the Judicial Conference of the United States is of the following views and conclusions:

(1) Under section 332, the judicial councils are intended to have, and have, the responsibility of attempting to see that the business of each of the courts within the circuit is effectively and expeditiously administered.

(2) The responsibility of the councils "for the effective and expeditious administration of the business of the courts within its circuit" extends not merely to the business of the courts in its technical sense (judicial administration), such as the handling and dispatching of cases, but also to the business of the judiciary in its institutional sense (administration of justice), such as the avoiding of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system, from the actions of a judge or other person attached to the courts.

(3) The councils have the responsibility and owe the duty of taking such action as may be necessary, including the issuance of "all necessary orders," to attempt to accomplish these ends.

(4) These responsibilities should ordinarily be approached, in the spirit and tradition of the judicial institution, in an attitude of attempted cooperation and assistance to the dis-

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[consent to assignment of active circuit or district judge], 332 [the general statute here involved], 457 [direct location of records]; 11 U.S.C. 62(b) [remove bankruptcy referee for cause, after notice of hearing], 65 (a), (b) [recommend the number and territories of bankruptcy referees], 68 (a), (b), (c) [recommend salaries and fees of referees], 71 (b), (c) [recommended filling referee's vacancy]; * * *.

> trict courts and not of purported policemanship, since the purpose of the statute is to make the Council an instrument to help prevent problems from arising, to help find solutions for those which have arisen, as well as to take such corrective action for prevention or solution "as may be necessary."

We think that these conclusions are eminently sound, and that the outstanding order of the Judicial Council of the Tenth Circuit comports with them. The totality of circumstances recited in the Council's order of December 13 established a *prima facie* basis for taking *some* appropriate action to correct what the judges of the Council knew from their direct experiences and from matters of official record were actual or apparent threats to public confidence in the administration of justice. It was assumed throughout the consideration of Section 332 that the councils would ordinarily proceed *ex parte*. See, *e.g., House Hearings*, p. 14 (Chief Justice Groner). In proposing a draft bill to the Judicial Conference of the United States in 1938, Chief Justice Hughes had explained (as quoted in the 1961 Report of the Judicial Conference, *supra*, p. 3):

> When you come to the supervision of the work of the judges, * * * there you have the great advantage of the supervision of that work by the men who know. The circuit judges know the work of the district judges by their records that they are constantly examining, while the Supreme Court gets only an occasional one. And the circuit judges know the judges personally in their districts; they know their capacities.

> And if complaints are made, they have immediate resort to the means of ascertaining their validity. That direct supervision can be made very effective, and I think far more so than the more remote supervision, entailing a great deal of labor and circumlocution, imposed upon the Chief Justice.[29]

To the extent that due process of law demands that no action be taken on the basis of *ex parte* assertions or suspicions of impropriety or nonfeasance, the statute certainly allows the council sufficient flexibility to fashion whatever procedures constitutional values may warrant in particular instances. In this case, the Council did set the matter for a hearing after it entered its interlocutory order, but Judge Chandler refused to attend the hearing, even though he was authorized to be accompanied by counsel. His refusal to participate in the hearing that was offered cannot now be excused by the argument that he was challenging the very jurisdiction of the Council (Reply to Suggestion of Mootness, p. 3). By that time the issues and statutory premises for the Council's jurisdiction had sufficiently crystallized that Judge Chandler was not entitled to ignore with impunity the Council's order (Resp. Mem. pp. 5–7) setting the matter for a hearing. Nor, in our view, can he fairly contend that the breadth of the

---

[29] Arthur Vanderbilt made the same point to the Senate Committee (*Senate Hearings*, p. 16):

> This bill has at least that very great advantage that, the circuit judges being responsible for the condition of the district courts within the circuits, have it within their power to know much more about what is going on in that circuit than could the Chief Justice or the Associate Justices of the Supreme Court here at Washington. * * *

invitation to "present such matters to the Council as he may deem fit" (Resp. Mem. p. 6) did not contain adequate notice of the subject matter of the hearing (Reply to Suggestion of Mootness, pp. 3–4). In its December 13 order, the Council had listed a number of specific grounds on which it believed there was a basis for assertion of its authority under 28 U.S.C. 332 (Pet. App. ii). Taken together, the Council's preliminary orders provided sufficiently specific information about the nature and purpose of a hearing to preclude Judge Chandler now from arguing that the extant order of February 4, 1966, is procedurally defective.

By the same token, the Council acted reasonably and within the ambit of its continuing authority in representing that it would consider modification of its assignment order (assuming the district judges had not agreed among themselves, as they were authorized to do, to alter it) upon Judge Chandler's certification that his backlog has been substantially reduced and that he is willing and able to undertake new assignments.

The United States appreciates the profound importance of maintaining an independent federal judiciary. But no judge of a lower federal court can claim that the Constitution forbids supervision of his official conduct—and his unofficial behavior insofar as it may affect the administration of public justice. Sections 137 and 332 of the Judicial Code are valid congressional responses to the need for the federal courts to maintain themselves as effective and trustworthy instru-

ments of justice. The only outstanding order of the Judicial Council of the Tenth Circuit, that entered on February 4, 1966, is authorized by these constitutional statutes and was validly promulgated.

## CONCLUSION

The motion for leave to file a petition for a writ of mandamus and/or prohibition should therefore be denied.

Respectfully submitted.

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*Assistant to the Solicitor General.*

SEPTEMBER 1969.

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

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No. 2 Miscellaneous

---

STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE
FOR THE WESTERN DISTRICT OF OKLAHOMA,

*Petitioner,*

v.

JUDICIAL COUNCIL OF THE TENTH CIRCUIT
OF THE UNITED STATES,

*Respondent.*

---

*ON PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION*

---

## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE

---

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IN THE

# SUPREME COURT OF THE UNITED STATES

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STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE
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---

*ON PETITION FOR WRIT OF MANDAMUS*
*AND/OR PROHIBITION*

---

## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE

---

On June 16, 1969 this Court entered an order granting the motion of Carl L. Shipley for leave to file a brief as *amicus curiae*, and set oral argument on October 20, 1969 on a motion for leave to file the petition for writ of prohibition and/or mandamus. Said order indicated that additional briefs might be filed by the parties, with the petitioner's brief due within 60 days and that of the respondent within 30 days thereafter. The brief of petitioner was filed on September 5, 1969, and a "Statement and

Report of the Judicial Council of the Tenth Circuit" on or about the same date, a copy of which was forwarded to petitioner under date of September 5, 1969, who in turn supplied a copy to this *amicus curiae*. In view of the shortness of time, it is respectfully requested that the Court permit the *amicus curiae* pursuant to Rule 42 to file this said brief, whether or not consent of the parties is obtained. The *amicus curiae* has requested the consent of the parties but does not wish to delay filing said brief. It is believed that the filing of an *amicus curiae* brief in support of the petitioner herein will not prejudice any party and may contribute to the cause of justice in representing the interest of the public, members of the Federal judiciary, members of the Bar, and others similarly situated, who might be affected by the Court's decision in the pending matter.

## BACKGROUND

On January 1, 1966, in No. 1111 Miscellaneous, October Term, 1965, in this Court, petitioner filed a "Petition for Writ of Prohibition and/or Mandamus" requesting this Court to restrain the respondent Judicial Council of the Tenth Circuit of the United States from exceeding its jurisdictional power in issuing an order stripping the petitioner of his power and authority to try or otherwise take action in cases and proceedings filed or instituted in the United States District Court for the Western District of Oklahoma, and asking this Court to direct the vacation of said order.

Petitioner stated in his petition that jurisdiction of this Court was invoked under 28 U.S.C. 1651. With the above petition, petitioner filed a "Motion for Leave to File Petition for Writ of Prohibition and/or Mandamus, and Petition and Writ of Prohibition and/or Mandamus".

In his statement of the case giving rise to the above pleadings, petitioner stated that on December 13, 1965, the Judicial Council of the Tenth Circuit met in special session in Denver, Colorado, without notice to him or opportunity for hearing, and adopted an order finding that petitioner

Judge Chandler was presently unable or unwilling to discharge the duties of his office and ordered in pertinent part:

> "That until the further order of the Judicial Council, the Honorable Stephen S. Chandler shall take no action whatsoever in any case or proceeding now or hereafter pending in the United States District Court for the Western District of Oklahoma; that all cases and proceedings now assigned to or pending before him shall be reassigned to and among the other Judges of said Court; and that until the further order of the Judicial Council, no cases or proceedings filed or instituted in the United States District Court for the Western District of Oklahoma shall be assigned to him for any action whatsoever".

As reasons for granting the requested writ of prohibition, petitioner has set forth that he had no relief available in any other Court in the land, that Title 28 U.S.C. 1251-1294 does not specifically confer on this Court or any Court of Appeals of the United States, jurisdiction to hear an appeal from a judicial council, and that the only relief available to Judge Chandler must come through an extraordinary writ as provided in 28 U.S.C. 1651(a), or through the inherent powers of this Court. Also, it was pointed out that since the Judicial Council of the Tenth Circuit has as its members the same circuit judges as would hear an appeal to the United States Court of Appeals for the Tenth Circuit, any hope of relief through that route would be futile. Petitioner has stated that while there may have been questions whether the extraordinary relief he prayed for could issue under the old "all-writs" statute (28 U.S.C. 377, 36 Stat. 1162), that the Act of June 25, 1948, 62 Stat. 944, broadened the jurisdiction of the Court under 28 U.S.C. 1651(a) not only to issue all writs necessary to its jurisdiction, but also all writs appropriate in aid of its jurisdiction.

Petitioner Chandler further asserted that the writ prayed for should be issued because it affords the only expeditious and effective means of confining the Judicial Council of the Tenth Circuit to a lawful exercise of its functions as pre-

scribed by 28 U.S.C. 332, the statute under which said Council asserted jurisdiction to issue its December 13, 1965 order; that the writ should issue because "a question of immense public importance is involved and it is peculiarly appropriate that action by this Court should be taken"; and that the writ prayed for should issue in order to preserve Judge Chandler's "constitutional rights of due process of law as set forth in Amendment V to the Constitution of the United States", and denied him in the proceeding of the Judicial Council of the Tenth Circuit.

On January 21, 1966 in No. 1111 Miscellaneous, *Chandler v. Judicial Council of the Tenth Circuit of the United States*, this Court in reliance upon a response of the Solicitor General to petitioner's application for a stay of the order of the Judicial Council which indicated that the order from which relief was sought was interlocutory in that prompt further proceedings at which Judge Chandler would be permitted to appear with counsel would be undertaken, denied the stay pending "contemplated prompt action of the Judicial Council".

The central issue in the present proceedings was touched upon in the dissent to the January 21, 1966 action of this Court of Mr. Justice Black, with whom Mr. Justice Douglas joined, to the effect that insofar as the Council invoked 28 U.S.C. 332 as the source of its jurisdictional authority:

> "There is no language whatever in this or any other Act which can by any reasonable interpretation be read as giving the Council a power to pass upon the work of District Judges, declare them inefficient and strip them of their power to act as Judges. The language of Congress indicates a purpose to vest the Judicial Council with limited *administrative* powers; nothing in this language or the history behind it indicates that a Council or Circuit Court Judge was to be vested with power to discipline District Judges and in effect remove them from office. This is clearly and simply a proceeding by Circuit Judges to inquire into the fitness of a District Judge to hold his office and to remove him

if they so desire. I do not believe Congress could, even if it wished, vest any such power in the Circuit Judges.

"One of the great advances made in the structure of government by our Constitution was its provision for an independent judiciary—for judges who could do their duty as they saw it without having to account to superior court judges or to anyone else except the Senate sitting as a court of impeachment. Art. II, paragraph 4 of the Constitution provides that 'Officers of the United States' which include judges, 'shall be removed from Office on Impeachment for, and Conviction of Treason, Bribery, or other high Crimes and Misdemeanors', and Art. I paragraphs 2 and 3, state that impeachment can be instituted only on recommendation of the House of Representatives and that trial can be held only by the Senate. To hold that judges can do what this Judicial Council has tried to do to Judge Chandler here would in my judgment violate the plan of our Constitution to preserve, as far as possible, the liberty of the people by guaranteeing that they have judges wholly independent of the Government or any of its agents with the exception of the United States Congress acting under its limited power of impeachment."

On September 18, 1967 the respondent sent the Clerk of this Court a copy of the minutes of the Judicial Council of the Tenth Circuit dated September 14, 1967 including a letter dated September 1, 1967 signed by all of the judges of the United States District Court of the Western District of Oklahoma advising that "the current order for the division of business of this district is agreeable under the circumstances" and that the Council "by reason of that acceptance by all the United States District Judges of the Western District of Oklahoma no action of the Council is either necessary or appropriate at this time".

Earlier in No. 1111 Miscellaneous, the Solicitor General on February 9, 1966 had filed a "Memorandum for

Respondent" indicating that since Judge Chandler had joined in the correspondence respecting the division of cases in his Court the petition in this case had become moot.

It is significant that neither the above response of the Solicitor General nor the action of the Council in forwarding to the Clerk of this Court the minutes of its meeting, directed attention to a letter of January 25, 1966 to the Judicial Council in response to the Council's order filed with the Clerk of the United States District Court, Northern, Eastern, and Western Districts of Oklahoma, and signed by Judges Luther Bohanon, Fred Daugherty and Luther B. Eubank or the attached order of the United States District Court for the Western District of Oklahoma, made pursuant to the order of the Judicial Council of the Tenth Circuit in special session on December 13, 1965, and filed with the Clerk of the above Court on December 28, 1965, dividing the cases among Judges Bohanon, Daugherty and Eubank, with assistance by Judge Rizley, and providing in its last paragraph in pertinent part as follows:

> "The execution of this order by Judge Chandler is done by him under protest and without prejudice to or waiver of any and all of his rights to have said order of the Judicial Council reviewed and vacated, stayed, or otherwise attacked. Dated this 25 day of January, 1966".
>
> /s/ Luther Bohanon
> Judge of the Northern, Eastern and Western District
>
> /s/ Fred Daugherty
> Judge of the Northern, Eastern and Western District
>
> /s/ Ross Rizley
> Judge
>
> /s/ Luther G. Eubank
> Judge"

## ARGUMENT

Carl L. Shipley as *amicus curiae* adopts and incorporates by reference as a part of his argument the portions of petitioner's pleadings referred to hereinabove and the additional statement of background facts set forth as a preliminary statement of the case.

A threshold question grows out of this Court's June 16, 1969 order setting this case for oral argument on the Motion for Leave to File the Petition for Writ of Prohibition and/or Mandamus, i.e., the question of jurisdiction. The Supreme Court of the United States is vested with two types of jurisdiction under Art. III of the Constitution, i.e., original jurisdiction and appellate jurisdiction. The former is limited to "all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party"; the latter relates to all other types of cases, "both as to law and fact, with such exceptions, and under such regulations as the Congress shall make". Congress has taken no action respecting appeals from orders of the judicial councils established by 28 U.S.C. 332. The legislative history and purpose of this section have been referred to by Mr. Justice Black as outlined herein above, and have been extensively discussed by judges, scholars and other witnesses in hearings on "Judicial Fitness" before the Subcommittee on Improvements on Judicial Machinery of the Committee on the Judiciary, United States Senate, 89th Cong. 2nd Ses., February 15, May 9 and June 17 and 20 and July 15, 1966; in hearings on "The Judicial Reform Act" before the same Committee of Congress, 90th Cong., 2nd Ses., on S. 3055, S. 3060, S. 3061, and S. 3062, on April 23, 24, May 1, 15, June 6, July 25, 1966, and in additional hearings before the same Committee of Congress on "Federal Judges and Courts" 91st Cong., 1st Ses., on S. 952, S. 567, S. 474, S. 585, S. 852, S. 898, S. 1036, S. 1216, S. 1509, S. 1646, S. 1712, and S. 2040 on April 15, 16 and May 6 and 7, 1969.

While there is some indication in the legislative history of the statute establishing the judicial councils (28 U.S.C.

332) that their determinations were to be "final", (See Hearings on Administration of United States Courts, H.R. 2973, House Judiciary Committee, 76th Cong., 1st Ses., page 13 (1939)), there is nothing in any judicial decision or in any testimony since that time respecting appellate jurisdiction or procedures for review of orders of judicial councils, or supporting that view.

The basic statutory provisions dealing with the appellate jurisdiction of this Court are contained in 28 U.S.C. 1252-1258, which provide for direct appeals to this Court from decisions invalidating Acts of Congress, from decisions of three-judge courts, from decisions of Courts of Appeals, from decisions of the Court of Claims, from the Court of Customs and Patent Appeals, and from the highest Court of a State. No light is shed upon the orders of judicial councils. In situations where Congress intended decisions of federal judicial bodies to be final, it has plainly said so, e.g., 28 U.S.C. 1447(d), 41 U.S.C. 321, 322. It cannot be presumed that Judge Chandler or any other party affected adversely in his rights, constitutional, statutory, or otherwise, by an order of a judicial council, was intended by Congress not to have a right of review of such order. Indeed, any such proposition would verge on the monstrous, since Art. III of the Constitution clearly contemplates appellate jurisdiction in this Court in all cases whatsoever. It would appear to be almost elementary that the finality of an order of a judicial council could not be assumed on the basis of the legislative history of a bill in one branch of Congress. That being so, then appellate jurisdiction respecting the specific order of the Judicial Council of the Tenth Circuit herein involved must lie somewhere where Congress has exercised its responsibility under Art. III of the Constitution respecting the appellate jurisdiction of this Court. In 28 U.S.C. 1252-1258, Congress provided for direct or other appeal from judicial bodies. The Council is not a judicial court and apparently did not purport to exercise judicial power. Art. III of the Constitution vests all judicial power "in one Supreme Court, and

in such inferior courts as the Congress may from time to time ordain and establish." 28 U.S.C. 332 does not establish judicial councils as either judicial or legislative courts. The action of the Judicial Council of the Tenth Circuit herein was in the form of an order signed by five judges in their individual capacities as Circuit Judges. Thus, it is clear the Council was not acting as an administrative agency, and in any event, in those cases where review of administrative agency decisions has been vested in judicial courts, e.g., the Federal Communications Commission (47 U.S.C. 402), Congress has so provided in positive terms. So it would appear that this Court must have jurisdiction of the pending petition for Writ of Prohibition and/or Mandamus under the so-called "all writs" section of 28 U.S.C. 1651, which provides in pertinent part as follows:

> "The Supreme Court and all Courts established by Act of Congress may issue *all writs necessary or appropriate in aid of* their respective jurisdictions and agreeable to the usages and principles of law." (Emph. supp.)

Even were it assumed that the order of judicial councils were in and of themselves final or not otherwise subject to review, the action of the Council in interfering with the disposition of pending cases before Judge Chandler, all of which were and are within the appellate jurisdiction of this Court, would seem to give this Court jurisdiction under the the "all writs" section to issue "all writs necessary or appropriate in aid of" its appellate jurisdiction over such cases and in aid of its jurisdiction over the actions of the Circuit Judges who signed the order in their capacities as individual Circuit Judges. And, in any event, this Court has all inherent power necessary to supervise all federal courts and agencies, all federal officers appointed and acting pursuant to the Constitution and all federal judges in whatever capacity exercising Art. III authority in constitutional courts and Art. I authority in legislative courts or similar bodies. Unless "due process" includes such inherent authority, it is meaningless. Apart from the question of

jurisdiction, this *amicus curiae* urges this Court to issue the writ petitioned for by Judge Chandler for the reasons referred to hereinabove. It is respectfully submitted that this Court not only should, but has a Constitutional obligation to, exercise its jurisdiction both inherent and under 28 U.S.C. 1651 over Judge Chandler's petition for a writ herein.

In addition to the information developed in the hearings cited above, of which this Court should take judicial notice, the Court's attention is invited to a confidential House Committee Print entitled "Report of Investigation of Judicial Behavior in the Tenth Circuit United States Court of Appeals by the Committee on the Judiciary, House of Representatives" 90th Cong., 2nd Ses., April 30, 1968 which was included as defendant's Exhibit D-16 in an opposition to a motion for summary judgment in *Chandler v. O'Bryan*, case No. 68-26 Civil, filed in September, 1969, U.S. District Court for the Western District of Oklahoma, and now apparently a part of the public record, wherein there is criticism of the situation in the Western District of Oklahoma but where it is concluded, after a thorough analysis of all of the charges and countercharges which gave rise to the action of the Judicial Council herein, that:

1. "Judge Chandler is a man of established reputation, position, integrity and worth in the community".
2. ". . .investigation has disclosed no evidence available at this time which would support a charge of impeachment against any of the judges investigated. If any of the judges should be removed because they are unfit to discharge their responsibilities the only mechanism provided by the Constitution, impeachment, is not available".
3. "The Action of the Tenth Circuit Judicial Council of December 13, 1965 to strip Judge Chandler of his power to hear cases was equivalent to his removal as a judge. It was an action completely beyond the legal authority of the

Council. Such action is forbidden by the Constitution. Congress has never authorized circuit judges to inquire into the fitness of a district judge to hold his office and to remove him if they so determined".

4. "Until the Constitution is amended or until Congress has enacted corrective legislation, no attempt should be made to solve judicial fitness problems through the administrative powers granted in 28 U.S.C. 332."

This same committee print includes a scholarly analysis of the fate of previous attempts to reconcile an independent judiciary with a mechanism to resolve questions of judicial behavior and fitness to hold judicial office other than by the impeachment process. In the words of the report:

> "Consideration of the problem of removal of Federal judges because they are unfit to perform their responsibilities involves serious constitutional questions. Is the impeachment process exclusive, or is it only a limitation on the powers of Congress to preserve an independent judiciary? Can the judiciary be given powers to discipline its own members in the absence of an amendment to the Constitution?"

The report discusses the official position of the American Bar Association in 1937 that a constitutional amendment would not be necessary and the subsequent fate of proposed legislation (H.R. 9160, 76th Cong. 3rd Ses., 1940) along these lines, as well as the defeat of a similar bill (H.R. 5939, 76th Cong.) where Congressman Emanuel Celler, now Chairman of the House Judiciary Committee, contended that "good behavior is not a justiciable question" and that the proposed procedure was unconstitutional. Mr. Celler stated that "Congress cannot pass bills of attainder by calling them bills of decapitation and exile". This latest report, although not as yet adopted by the House Judiciary Committee, concludes with the important observation that:

> "The issue of whether an amendment to the Constitution is needed for the removal of Federal

> judges remains surrounded by controversy. Certainly all controversy can be avoided, and the independence of the judiciary safeguarded, if any new procedure for the removal of Federal judges would be authorized by appropriate amendment to the Constitution."

It is respectfully submitted that this Court should take judicial notice of the above quoted committee print in view of the fact that it has become an official part of the pleadings in a case involving matters which, in part, gave rise to the order of the Judicial Council of the Tenth Circuit which Judge Chandler requests this Court to prohibit by appropriate writ as a flagrant and unjustified usurpation of power in violation of both 28 U.S.C. 332 and the due process provisions of the Constitution. Whether or not the committee print is ever formally adopted as a report of the House Judiciary Committee, its conclusions are worthy of consideration by this Court.

WHEREFORE, the premises considered, it is respectfully submitted that this Court has both inherent jurisdiction under the Federal Constitution and statutory jurisdiction under 28 U.S.C. 1651 to entertain Judge Chandler's petition for a writ, and it should exercise its jurisdiction and issue the requested writ forthwith.

Respectfully submitted,

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No 2 Misc.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

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STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, Petitioner,

v.

JUDICIAL COUNCIL OF THE TENTH CIRCUIT, Respondent.

---

ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF PROHIBITION AND/OR MANDAMUS

---

## BRIEF OF PETITIONER

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November 28, 1969

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

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No. 2 Misc.

STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, Petitioner,

v.

JUDICIAL COUNCIL OF THE TENTH CIRCUIT, Respondent.

---

ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF PROHIBITION AND/OR MANDAMUS

---

## BRIEF OF PETITIONER

---

## OPINIONS BELOW

The Judicial Council's order, dated December 13, 1965, *In the Matter of the Honorable Stephen S. Chandler, United States District Judge for the Western District of Oklahoma,* is not reported but is set out as Exhibit A in the Appendix to the petition for a writ of prohibition and/or mandamus at pp. i-iii. The Judicial Council's order, dated February 4, 1966, apportioning the judicial business of the District Court for the Western District of Oklahoma, is at pp. 10-16 of Memorandum filed on behalf of Respondent, on file herein. The minutes of the September 14, 1967 meeting

of the Judicial Council, and attachments thereto, finding that no further action by the Council is either necessary or appropriate, is on file with the Clerk of this Court.

## JURISDICTION

The jurisdiction of the Court is invoked under the All Writs Act, 28 U.S.C. 1651(a) and under the Court's inherent powers. The Judicial Council, through what developed as a single, integrated act, first stripped Judge Chandler of all his judicial powers and then, through successive orders, restored to him part of his judicial powers, but only that amount deemed necessary by the Judicial Council for its act to escape review by this Court. The Council's extended but single act affects sufficiently matters within this Court's appellate jurisdiction to bring this application for extraordinary relief within the All Writs Act.

Petitioner could not present the argument in support of jurisdiction better than did Solicitor General Griswold, in his Brief *amicus curiae*, pp. 14-31, and accordingly adopts such argument as his own.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves the following constitutional provisions:

1. Article I, Section 2, clause 5

The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.

2. Article I, Section 3, clauses 6 and 7

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath of Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And

no person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to law.

3. Article III, Section 1

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

4. Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This petition involves the following statutory provisions:

1. 28 U.S.C., § 1651(a), 62 Stat. 944, amended May 24, 1949, c. 139, § 90, 63 Stat. 102

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate

in aid of their respective jurisidctions and agreeable to the usages and principles of law.

2. 28 U.S.C., § 137, 62 Stat. 897

The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.

The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.

If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

3. 28 U.S.C. § 332, 62 Stat. 902, and 28 U.S.C., 1940 ed., § 448 (Mar. 3, 1911, c. 231, § 306, as added Aug. 7, 1939, c. 501, § 1, 53 Stat. 1223.

These two statutes are set forth herein under Argument, page 13.

## QUESTIONS PRESENTED

1. When a Judicial Council orders a federal district judge to take no action whatsoever in any case or proceeding then or thereafter pending in the federal district judge's court, has the Judicial Council exceeded its jurisdictional authority as conferred by 28 U.S.C. § 332 or limited by the Constitution?

2. When a Judicial Council initially seeks under 28 U.S.C. 332 to strip from a district judge all his powers to hear cases but, upon being hailed before this Court, restores part of these powers while withholding the rest under a pretext of acting pursuant to 28 U.S.C. 137, has the Judicial Council cured any defects in its statutory or constitutional authority to strip powers from the federal judge?

## STATEMENT OF THE CASE

On December 13, 1965, the Judicial Council of the Tenth Circuit of the United States met in special session at Denver, Colorado.

The purpose of the special session, according to an Order (Exhibit A of the Appendix to the petition for a Writ of prohibition and/or mandamus) made at the Session, was to review the effect of Chief Judge Stephen Chandler on the business of the United States District Court for the Western District of Oklahoma.

Judge Chandler was given no notice of the calling of the Special Session or of its purpose. He was given no opportunity to be present during the deliberations of the Special Session, no opportunity to hear the nature of any complaint about him, no opportunity to rebut complaints, cross-examine accusers, or present explanations or evidence in his own behalf, and no opportunity to be represented at the Special Session by counsel.

The Judicial Council, at its special session, made an Order finding that Judge Chandler was presently unable or unwilling to discharge efficiently the duties of his office. The Order stated that, until the further order of the Judicial Council, Judge Chandler was stripped of his power and authority to hear and decide cases or take any action whatsoever in all cases or proceedings then or thereafter pending in his Court.

The Order cited, as specific reasons justifying this finding and Order, that during the past four years Judge Chandler had been a party defendant in both civil and criminal litigation, of which one civil case was still pending, and that two proceedings had been brought in a United States Court of Appeals to disqualify Judge Chandler from handling specific litigation, in one of which proceedings he was ordered to proceed no further and in the other proceeding the matter was still pending.

Other than these specific reasons, nothing was cited to justify the Order except a vague reference to "the entire situation" and to "the attitude and conduct of Judge Chandler" as they affect the business of his Court.

The Order was not filed, made public or its terms made known to Judge Chandler for two weeks, although rumors of the entry of a punitive order circulated. It was finally filed in the United States Court of Appeals for the Tenth Circuit on December 27, 1965, and in the United States District Court for the Western District of Oklahoma on December 28, 1965.

On January 6, 1966, petitioner filed with this Court a motion for leave to file a petition for a writ of mandamus and/or prohibition directed to the Judicial Circuit. Petitioner also applied for a stay of the Judicial Council's order.

In opposing Judge Chandler's Application for Stay, the Judicial Council, through its counsel, Solicitor General Thurgood Marshall, referred darkly to some matters on file, suggested that a third statute, 28 U.S.C. § 272 (b), was also available as authority for the Judicial Council's assault upon Judge Chandler (thus implicitly charging that Judge Chandler was mentally disabled), and asserted that "public confidence in the federal judiciary would inevitably be impaired if Judge Chandler was allowed to preside over the District Court" during these proceedings. The Judicial Council also represented to this Court that the order was "entirely interlocutory in character," that the Council had "intended to permit" Judge Chandler to be heard, that "upon a request by Judge Chandler" the Council would promptly conduct a hearing, and that "at these proceedings, the Council contemplates that Judge Chandler will, if he wishes, appear before the Council."

This Court, while expressing "no opinion concerning the propriety of the interlocutory action taken" by the Council, denied the Application for a Stay "pending this contemplated prompt action of the Judicial Council."

Judge Chandler quickly notified this Court and the Judicial Council that he would neither request nor attend a hearing conducted by a body whose jurisidction he challenged, and he urgently renewed his application for Stay of the Council's Order.

The Judicial Council thereafter held its second secret session and issued a most bizarre "order." A "hearing" was ordered for February 10, 1966, at Oklahoma City, but no person, including Judge Chandler, was ordered to attend. The subject matter of the hearing was not even given, but Judge Chandler was advised he "may appear in person and with counsel and present such matters to the Council as he may deem fit."

Judge Chandler announced his refusal to attend this strange "hearing", confident that this was not the type of proceeding Solicitor General Marshall and this Court had understood would be held.

At this point, the other judges of Judge Chandler's court, noting the poor prospects for a speedy determination of Judge Chandler's rights to hear cases, felt it their duty to advise Judge Chandler that the Judicial Council's Order of December 13, 1965 not only stripped him of his powers but ordered that all the judges of their court enter into a new order dividing the court's cases (including the cases already assigned to Judge Chandler) among all the judges except Judge Chandler.

It was at this time that Judge Chandler detected how cleverly the first order had been constructed: If he agreed to a division of his cases, it could be said he acquiesced in the Council's Order. But if he disagreed, the Council could refer to such disagreement as conferring jurisdiction upon it under the provisions of 28 U.S.C. § 137.

Judge Chandler wished to avoid at any cost action which might appear to cure the jurisdictional problems of the Judicial Council. After careful consideration, he concluded

his best strategy required that he should go along with the other district judges with respect to the assignment of new cases in his court, but that he should stand firm and refuse to give up those cases already pending before him and moving along in the judicial process when the first order was filed. He reached this conclusion after a careful study of 28 U.S.C. § 137 convinced him such statute refers only to newly filed cases and not to cases already assigned to judges.

Soon thereafter, a third secret and special session was held by the Judicial Council, and a third order was issued. This order cancelled the hearing, restored to Judge Chandler his powers with respect to his old cases, noted his disagreement with his colleagues with respect to these old cases and cited this as its authority to divide all new cases among the other judges, and stated that the first order was superseded.

Soon thereafter, in February 1966, Solicitor General Marshall, in his Memorandum for Respondent, suggested the case had become moot, because of the Council's third order. This suggestion was contested by petitioner, and Solicitor General Marshall, in his Supplemental Memorandum for Respondent, agreed in a footnote that the case was not moot. More important, it was in this Supplemental Memorandum for Respondent that the Judicial Council revealed its newest strategy: it would thenceforth suppress Judge Chandler's judicial powers under the guise of helping him clean up a crowded docket, action superficially more compatible with the provisions of 28 U.S.C. 137 than with those of 28 U.S.C. 332. The Supplemental Memorandum for Respondent was crammed with poppycock suggesting that Judge Chandler had expressed a "wish to dispose of his current docket", that "the condition of Judge Chandler's docket made it advisable that he substantially reduce his docket before undertaking new judicial business," that "it is not clear from petitioner's reply whether Judge Chandler is, in fact, willing and able to take on the assignment of new cases at the present time," and that "the Court . . .

retain [ ] the case upon its docket until such time as the Council acts upon any future certification by Judge Chandler of his readiness to participate in the assignment of new cases."

Petitioner, in Petitioner's Reply to Supplemental Memorandum for Respondent, attempted to point out to the Court that the first order of the Judicial Council had recited quite different grounds as supporting the stripping of Judge Chandler's judicial powers and that the Court should not be misled concerning the true intent of the Judicial Council, which was to restrict to the fullest extent possible the power of Judge Chandler to hear or decide cases.

Apparently, the Court adopted Solicitor General Marshall's suggestions, for it did nothing for a considerable period of time, fifteen months in fact, during the last seven months of which period the Judicial Council, with a perfectly straight face, went through the motions of creating a written record of its concern with and attention to the state of Judge Chandler's docket. The Judicial Council even obtained from the Administrative Office of the United States Courts a considerable body of statistics concerning Judge Chandler's disposition of cases on his docket, which statistics it apparently was hoped would support the Council's belated claim of acting to help Judge Chandler clean up his docket, but the statistics failed to do so.

At the conclusion of this fifteen month period, the Clerk of the Court, at the Court's direction, wrote to the parties seeking information concerning the status of the case, saying that the Justices

> "were uncertain as to what had occurred since we were last in touch with you. Would you be good enough to inform us as to any events which may have occurred since your papers were filed and any views you may have as to the effect of such events on the pending proceedings."

Shortly thereafter, the Judicial Council convened, noted that Judge Chandler had only twelve cases pending, and requested the judges of Judge Chandler's court to consider and agree upon a new division of business in their court. Judge Chandler, in a letter to his colleague judges, pointed out that the Judicial Council was begging them to take action that the Council hoped might moot this case and thereby spare all Judicial Councils the unpleasantness of losing their supposed disciplinary powers, which could result from the adjudication of this case. Judge Chandler also pointed out to the other judges of his court:

> "Nor is this letter a plea for any particular action on your part. I believe each judge must be left free to consult only with his God and then do what he thinks is fair and decent and right."

For reasons known only to each judge, but through acts beyond the control of Judge Chandler, the five judges of Judge Chandler's court each signed a letter addressed to the Judicial Council advising "that the current order for the division of business in this district is agreeable under the circumstances," Thereby maintaining in force the February 4, 1966 division-of-business order forced upon them by the Judicial Council, which order deprives Judge Chandler of any power to hear cases other than those on his docket prior to the entry of the Council's original order of December 13, 1965.

The Judicial Council soon reconvened and concluded that "no action of the Council is either necessary or appropriate at this time." The February 4, 1966 division-of-business order continued to remain in effect. In June 1969, Judge Chandler filed a Motion to Advance. On June 16, 1969, the Court denied this motion but set the cause for oral argument at the beginning of the 1969 Term, nearly four years after the commencement of this action.

## ARGUMENT

The Judicial Council has pursued, singlemindedly, since December 1965 a course of action calculated to deprive Judge Chandler of the powers of his judicial office to hear and decide cases.

Initially, with the filing of the Order of December 13, 1965, the deprivation was intended to extend to all cases, cases already in his court or to be filed in his court. The procedures and manner chosen by the Council to attack Judge Chandler's powers were so shocking to the bench, bar and public, particularly because of the Council's disregard of all due process of law requirements, that the Council was forced to remold its attack into more socially acceptable forms. This necessitated limiting the attack to a deprivation only of Judge Chandler's powers to hear and decide cases filed in his court in the future.

The niceties of the Council's remolding the more limited attack involved, successively, (1) brief homage paid to public sensibilities concerning fair hearings and due process of law, (2) abandonment of reliance upon its disputed disciplinary powers (28 U.S.C. 332) as authority for its attack in favor of reliance upon its peace-making powers (28 U.S.C. 137) under claim that a dispute existed with regard to a division of cases in Judge Chandler's court, (3) the further refinement of its attack by returning to 28 U.S.C. 332 but this time under invocation of that statute's legitimate housekeeping powers, claiming that all along it had been concerned with a crowded docket problem, (4) a request for more time in the hope that such time would see Judge Chandler resign from the bench or from life, and (5) the offering of a reprieve to Judge Chandler when the duration of the sustained attack could no longer be maintained under any form of make believe, which reprieve was not within Judge Chandler's sole power to accept and which was refused by the five district judges who together could have accepted it.

The original order depriving Judge Chandler of all his powers was based, according to the Council itself, upon the

power and authority vested in the Council by the Act of June 25, 1948, c. 646, § 332, 62 Stat. 902, 28 U.S.C. 332. The legislative history of this statute does not support this assertion.

It should initially be noted that the Act of June 25, 1948, 62 Stat. 902 was only a revision of Title 28, United States Code, was not intended to change the law existing then but only to organize it better to eliminate obsolete or revoked statutes, and to clarify any awkwardly expressed but understood intentions. House Report No. 308, 80th Congress.

The true legislative history of 28 U.S.C. § 332 is that of the Act of August 7, 1939, 53 Stat. 1223, which had as its purpose the establishment of the Administrative Office of the United States Courts and contained in its Section 306 the forerunner of today's 28 U.S.C. § 332.

The report of the Senate Committee on the Judiciary, Senate Report No. 426, 76th Congress, which accompanied the 1939 legislation, clearly shows that its main purpose was to transfer from the Attorney General to a newly created Administrative Office of the United States Court the burden of administration over every petty detail affecting the federal courts and that its second purpose was to provide administrative machinery whereby the lagging work of the courts could be expedited and kept up to date.

Seante Report No. 426, 76th Congress, and Section 306 of the Act of August 7, 1939, c. 501, 53 Stat. 1223, both tie the work of the Judicial Councils to the data-collecting and statistics-compiling duties of the Administrative Office of the United States Courts, and they tie the directive power of the Judicial Councils over district judges to the corrections of the delays and the administrative criticisms revealed in the quarterly reports of the Administrative Office.

This is far from the tyrannical powers the respondent arrogated to itself when it issued its purported Order against Judge Chandler.

It should further be noted that when the revisory legislation of 1948 was enacted, the revisers drastically altered the order of thoughts in 28 U.S.C., 1940 ed., § 448, relating to Judicial Councils, and the resulting section, today's 28 U.S.C. § 332, might appear to support plenary disciplinary powers over federal district judges by Judicial Councils. Compare carefully the violence done to the 1939 statute by the revised 1948 version:

1939 Statute

To the end that the work of the district courts shall be effectively and expeditiously transacted, it shall be the duty of the senior circuit judge of each circuit to call at such time and place as he shall designate, but at least twice in each year, a council composed of the circuit judges for such circuit, who are hereby designated a council for that purpose, at which council the senior circuit judge shall preside. The senior circuit judge shall submit to the council the quarterly reports of the Director required to be filed by the provisions of section 304, clause (2), and such action shall be taken by the council as may be necessary. It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts. Nothing contained in this section shall affect the provisions of existing law relating to the assignment of district judges to serve outside of the districts for which they, respectively, were appointed.

1948 Revised Version

The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit judges for the circuit, in active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall atend all sessions of the council.

The council shall be known as the Judicial Council of the circuit.

The chief judge shall submit to the council the quarterly reports of the Director of the Administrative Office of the United States Courts. The Council shall take such action thereon as may be necessary.

Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.

Despite the violence done to the 1939 statute, the pertinent reviser's note revealed to Members of Congress voting on the 1948 revisory legislation only that "changes in phraseology were made" to 28 U.S.C., 1940 ed., § 448. House Report No. 308, 80th Congress. Surely, this lack of notice to the Congress of important restructuring of statutory language could not be the basis for altering the original congressional intention expressed in 1939, which intention by no stretch of the imagination embraced authority for the summary stripping of federal district judges' judicial powers by Judicial Councils.

The Judicial Council of the Tenth Circuit has clearly acted beyond the jurisdictional power given it by its creator, the Congress of the United States, as evidenced by a reading of the legislative history of 28 U.S.C., § 332. Since the Council, despite its many disguises, has never dropped its efforts to discipline Judge Chandler by withholding his powers to hear and decide cases, the original lack of legislative authority for the Council's claimed powers has tainted all that followed.

In addition, the Judicial Council has broken through the jurisdictional boundaries imposed upon the entire Judiciary by the Constitution and has penetrated deeply into the constitutional powers of the Congress.

Article I, Section 2, clause 5; and Article I, Section 3, clauses 6 and 7 of the Constitution confer upon the Congress the sole power of impeaching and trying federal officers for misbehavior. And Article III, Section 1 of the Constitution redoubles and focuses this congressional power in the instance of federal judges by guaranteeing that they shall hold their offices during good behavior. Impeachment by the Congress is the only way to strip a federal district judge of his office.

The Judicial Council, by its Order, has stripped Judge Chandler of his judicial authority and powers and left him only the shell of his office. The Constitution can not be so easily subverted. The office of a federal district judge

is not his office space, his desk, his robe hanging in a closet. The judicial powers—the authority to take action in cases and proceedings in his court—are a judge's office. The Judicial Council has removed Judge Chandler's office from him, and it thereby transgressed the impeachment powers of the Congress and deprived Judge Chandler of his Constitutional rights under Article III, Section 1.

Solicitor General Griswold, in his brief *amicus curiae,* p. 33, argues that the Constitution does not prevent Congress from providing procedures by which the courts could try the right of a judge to continue to hold office. But the Congress has not done this, even if it can and that question is not now before the Court. 28 U.S.C. § 332 has to be tortured to afford such an interpretation.

Judge Chandler was deprived of other constitutional rights, those guaranteed every citizen by the due process of law clause of Amendment V to the Constitution. He was deprived of liberty and property by secret and summary procedures so shocking that they recall those of the British Star Chamber.

He received no notice of the Judicial Council's special session, was not advised of the nature of the charges or complaints made against him, was not allowed to be present at the meeting, was not allowed to confront and cross-examine his discreditors, if any, was not permitted to present a defense or to be represented by counsel. The Order which issued from this proceeding attempts to reduce and confine Judge Chandler to a federal judge in name only. It cracks the whip and tells him what he can and cannot do. It attempts to take from him the meaning and worth and powers of his office. Surely, the Judicial Council can not cure its due process of law defects by a mere shift in posture that must be apparent to this Court.

Since the initial challenge by Judge Chandler of the Council's disciplinary action, many new defenses of this action have been advanced and many assumed postures have been corroborated. Let it not be forgotten that the Judicial

Council initially recited, as justifying the stripping from him of all his powers, that Judge Chandler had been a party defendant in both civil and criminal litigation and that two proceedings had been brought to disqualify him from handling specific litigation. There was no mention made of either a disagreement within Judge Chandler's court concerning the division of cases or a refusal of Judge Chandler to dispose of his cases. Surely, the Council would have latched on to something substantial such as this, had it been so, for this would have provided more solid support for the Council's action.

The truth is, the Council overlooked the possiblity that Judge Chandler would haul the Council before this Court for a review of its actions. Feeling the surge of a knock-out blow, the order of December 13, 1965 was drafted with a view to maximum destruction of Judge Chandler's reputation and standing within the community. Then, armed with this club and withholding only the filing of the order, the Council, through intermediaries, presented to Judge Chandler its ultimatum—retire or be ruined. He risked ruin, and the order was filed.

There has never to this day been a single attempt by the Council to justify its attack on Judge Chandler's powers on the original grounds relied upon, his involvement as a party defendant in civil and criminal litigation and two instances of disqualification by the Tenth Circuit from handling specific litigation. Since a scrutiny of the results of this litigation reveals a quashing of the misdemeanor indictment against him for failure of any crime having been committed and judgments in favor of Judge Chandler in the civil litigation, the Council must have sensed how futile it would have been to try to justify its attack on Judge Chandler upon these flimsy grounds. The order made good reading, though, and was given prominent display in the newspapers. Can men who initiate an assault so crudely command the presumption of this Court that they straightforwardly acted thereafter in conformance with a paper record later created?

Solicitor General Griswold argues the case has become moot. But, the Council's voluntary termination of illegal conduct does not deprive this Court of power to hear and determine this case. *United States v. W.T. Grant Co.*, 345 U.S. 629, 73 S.Ct. 894 (1953). A controversy remains to be settled, a dispute over the legality of the challenged practices. The Council is free to return to their old ways. Mooting can occur only if the Council can bear the heavy burden before this Court of demonstrating that there is no reasonable expectation that the wrong will be repeated. This, the Council has not done. Rather, it has demonstrated an unwillingness to deal openly with the true nature of its conduct.

## CONCLUSION

The Judicial Council commenced, in December 1965, an attack on Judge Chandler's judicial powers. The attack never ceased, only abated. It was initiated without statutory or constitutional authorization. When its authority was challenged, the Council begged for time. Rituals were performed to corroborate more socially and legally acceptable reasons for the Council's attack, which continued. After two and a half years the Council offered to give up by offering to persons not a party to this action the ability to wash away the effects of the outstanding punitive order of February 4, 1966. These persons chose to do nothing and to await the outcome of this action. The case is not moot.

Judge Chandler is entitled to a writ of prohibition and/or mandamus, commanding the Judicial Council to cease act-

ing violation of its powers and in violation of Judge Chandler's rights as a federal judge and an American citizen.

Respectfully submitted,

Thomas J. Kenan

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*Counsel for Petitioner*

November, 1969.

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JOHN F. DAVIS, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 2 Misc.

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STEPHEN S. CHANDLER,
United States District Judge for the
Western District of Oklahoma
*Petitioner,*

vs.

JUDICIAL COUNCIL OF THE TENTH CIRCUIT
*Respondent.*

---

**On Motion for Leave to File a Petition for Writ of Prohibition and/or Mandamus**

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## BRIEF FOR THE RESPONDENT

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| *Marbury* v. *Madison,* 1 Cranch 137 (1803) | 7, 18 |
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OTHER AUTHORITIES:

Comment, *Removal of Federal Judges—New Alternatives to an Old Problem,* 13 UCLA L.REV. 1385 (1966) ---------- 10

Currie, *Federal Courts: Cases and Materials* (1968) ---------- 10

*Hearings on Administration of United States Courts before a Subcommittee of the Senate Judiciary Committee,* 76th Cong., 1st Sess. (1939) ----------9, 27

*Hearings on the Judicial Reform Act, S. 3055, etc., before the Senate Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary,* 90th Cong., 2d Sess. (1968) ----------8, 13

H. Rep. No. 702, 76th Cong., 1st Sess. (1939) 9

Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History,* 36 U.Chi.L.Rev. 665 (1969) ---------- 23

Lumbard, *The Place of the Federal Judicial Councils in the Administration of the Courts,* 47 A.B.A.J. 169 (1961) ---------- 26

Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court,* 1962 Sup.Ct.Rev. 153 13

*Report on the Powers and Responsibilities of the Judicial Councils,* H. Doc. No. 201, 87th Cong., 1st Sess. (1961) ----------8, 9, 22, 26

Shafroth, *Modern Developments in Judicial Administration,* 12 Amer.U.L.Rev. 150 (1963) -- 26

Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities under the Constitution,* 28 Mich.L.Rev. 485, 723, 870 (1930) ---------- 23

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Stolz, *Disciplining Federal Judges*, 57 Calif.L. Rev. 659 (1969) ---------- 23

Story, *Commentaries on the Constitution of the United States* (3d ed. 1858) ---------- 12

Taft, *Adequate Machinery for Judicial Business*, 7 A.B.A.J. 453 (1921) ---------- 26

Vinson, *The Business of Judicial Administration*, 35 A.B.A.J. 893 (1949) ----------25, 26

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JUDICIAL COUNCIL OF THE TENTH CIRCUIT
*Respondent.*

---

**On Motion for Leave to File a Petition for Writ of Prohibition and/or Mandamus**

---

## BRIEF FOR THE RESPONDENT

---

### Opinions Below

There are no opinions below, nor is there a record as such, in this case. Most of the relevant documents are contained in the Statement and Report of the Judicial Council of the Tenth Circuit (cited hereafter as "Statement"), filed with this Court in September, 1969.

## Jurisdiction

Petitioner claims that this Court has jurisdiction under 28 U.S.C. § 1651(a). Respondent does not believe that this Court has jurisdiction and has briefed the jurisdictional issue as a distinct question presented.

## Questions Presented

1. Whether this Court has constitutional jurisdiction and statutory authority to entertain, in the first instance, an application for an extraordinary writ to review the determinations of a circuit judicial council?

2. Whether the determinations made by the Judicial Council of the Tenth Circuit regarding the judicial business to be assigned to petitioner as a district judge were authorized by statute and consistent with the Constitution?

## Statutes Involved

The relevant statutes are set forth at pages 3-4 of the Brief of the Solicitor General as amicus curiae.

## Statement

The case is correctly stated at pages 4-12 of the Brief of the Solicitor General. It may help the Court, however, for us to set forth here a chronology of the events in this case.

December 13, 1965 — the Judicial Council ordered that until further order Judge Chandler was to take no action in any case pending before him and that no new cases were to be assigned to him. (Statement 1-5). This order was filed December 27, 1965.

January 6, 1966 — Judge Chandler filed with this Court his motion for leave to file a petition for an extraordinary writ directed to the Judicial Council, and also asked this Court to stay the order of the Judicial Council. (Motion for Leave to File.)

January 13, 1966 — Solicitor General Marshall, on behalf of the Judicial Council, filed with this Court opposition to the request for a stay, accompanied by a statement of the Judicial Council emphasizing the temporary nature of the December 13th order and the willingness of the Judicial Council to give Judge Chandler a prompt hearing. (Memorandum for the Respondent in Opposition to the Application for Stay.)

January 21, 1966 — this Court denied the stay application. 382 U.S. 1003 (1966).

January 25, 1966 — the judges of the Western District of Oklahoma advised the Judicial Council that they had agreed on the division of new business filed in that court but that they could not agree on the assignment to other judges of cases then pending before Judge Chandler. (Statement 6-13.)

January 27, 1966 — the Judicial Council set a hearing for February 10th with regard to Judge Chandler. (Statement 14-16.)

February 4, 1966 — the Judicial Council, having been advised that no judge of the Western District wished to be heard by it (Statement 17-20), cancelled the hearing set for February 10th. The Judicial Council, acting under 28 U.S.C. §§ 137 and 332, ordered that new cases in the Western

District were to be divided as provided in the agreement of the judges on January 25th. It resolved the disagreement of the judges about cases already pending by ordering that cases assigned to Judge Chandler as of December 28, 1965, should remain assigned to him. (Statement 21-31.) The Judicial Council further provided that "this order supersedes the orders of the Council entered on December 13, 1965, and on January 27, 1966," and it authorized the judges of the Western District to amend or modify the division of business provided in this order. (Statement 27.)

March 22, 1967 — on the basis of information provided by the Administrative Office, the Judicial Council concluded that no present action was indicated relative to the assignment of judges in the Western District. (Statement 34.)

July 12, 1967 — the Judicial Council, noting that only 12 cases remained pending before Judge Chandler, requested the judges of the Western District to agree on a rule or order for the division of business among them. (Statement 56-60).

September 1, 1967 — the judges of the Western District including Judge Chandler, advised the Judicial Council that "the current order for the division of business in this district is agreeable under the circumstances." (Statement 61.)

September 14, 1967 — the Judicial Council concluded that in view of the letter of September 1st from the judges "no action of the Council is either necessary or appropriate at this time." (Statement 62-64.)

June 4, 1969 -- Judge Chandler filed a motion in this Court to advance this case on the docket.

June 16, 1969 — this Court denied the motion to advance but set oral argument for October 20, 1969. 395 U.S. 956 (1969).

September 5, 1969 — Judge Chandler (Brief of Petitioner and Waiver of Oral Argument) and the Judicial Council (Statement 66) advised the Court that they wished to waive oral argument of the case.

October 13, 1969 — this Court removed the case from the current argument list and "ordered that briefs and oral arguments be presented by counsel for the parties." 396 U.S. — (1969).

## Summary of Argument

### I.

If this proceeding invokes the appellate jurisdiction of the Court, the All Writs Act, 28 U.S.C. § 1651(a), apparently provides statutory authority for the Court to act, though the matter is not free from doubt. But this proceeding is appellate in nature only if the action challenged was judicial action by a lower court. The action of the Judicial Council was administrative, not judicial, in nature and the Judicial Council is not a court. Accordingly this proceeding is an impermissible attempt to invoke the original jurisdiction of this Court in a case not within the constitutional allocation of original jurisdiction.

### II.

There is no occasion now to determine whether the

order of December 13, 1965, was vulnerable whether on substantive or on procedural grounds. The order has long since been superseded.

The order now in effect, permitting Judge Chandler to dispose of cases pending before him on December 28, 1965, but barring the assignment of new cases to him, is in accord with his view as to the proper division of business in his district and cannot be complained of by him. Even if Judge Chandler had not acquiesced in this division of business, the Judicial Council is authorized by sections 137 and 332 of the Judicial Code to require this division.

The legislative history of the statute creating judicial councils, and the subsequent understanding of that statute by those concerned with it, show that Congress intended to give to the judicial councils all administrative powers necessary to maintain efficiency in the courts of the United States and public confidence in the administration of justice.

## Argument

### I. This Court Does Not Have Jurisdiction Of This Proceeding.

It is with the utmost reluctance that respondent feels bound to challenge the jurisdiction of this Court in this case. The Judicial Council, no less than Judge Chandler, is desirous of a prompt and authoritative answer to the question whether it is acting within the power granted it by Congress. But the issue of jurisdiction is, as the Solicitor General says, "far from clear" (Sol.Gen.Br. 14), and counsel for respondent would be derelict in his duty to this Court if he did not bring to the attention of the Court the considera-

tions that have persuaded him that jurisdiction does not exist.[1]

In dissenting from the denial of a stay of the Judicial Council's order of December 13, 1965, Justices Black and Douglas characterized the Judicial Council as a "governmental agency" entrusted only with "limited *administrative powers.*" 382 U.S. 1003, 1005 (1966). The Solicitor General has taken note of those statements and says:

> If that characterization is accurate, this Court has no jurisdiction under the Constitution to pass upon Judge Chandler's petition. No further authority would be needed to sustain this conclusion than *Marbury* v. *Madison,* 1 Cranch 137.

(Sol.Gen.Br. 15.) The Solicitor General is of course quite right. No authority other than *Marbury* is needed for the proposition, but other authority exists. Numerous cases support the proposition that the authority of this Court to issue writs of prohibition or mandamus "can be constitutionally exercised only insofar as such writs are in aid of its appellate jurisdiction." *Ex parte Peru,* 318 U.S. 578, 582 (1943). See also *Ex parte Barry,* 2 How. 65 (1844); *United States* v. *Ferreira,* 13 How. 40 (1851).

The Solicitor General is equally correct when he says that the key question is

> whether a judicial council is, for these purposes,

[1]When counsel was asked by the Judicial Council to act as its attorney, he was told: "It is the Council's desire that you should have a completely free hand in your consideration and resentation of this matter." No member of the Judicial Council has seen this brief prior to its filing. No member of the Judicial Council has made any suggestion about what it should or should not contain.

> a "lower court" or "inferior tribunal" whose decisions are reviewable in the exercise of this Court's appellate jurisdiction, rather than an administrative agency whose personnel happen also to serve as circuit judges.

(Sol.Gen.Br. 17.) Respondent parts company with the Solicitor General when he concludes, in response to that question, that "at least insofar as a Council is acting to direct the conduct of judicial business by district judges, it is functioning both in form and in substance as a judicial tribunal * * *." (Sol.Gen.Br. 17.) Respondent believes that Justices Black and Douglas were wholly right in their characterization of judicial councils, that these councils are agencies whose powers are entirely administrative, and that they have always been so regarded.

In 1961 a special committee of the Judicial Conference of the United States, of which Chief Judge Johnsen of the Eighth Circuit was chairman, reported to the Conference on the proper role of judicial councils. This report was approved by the Judicial Conference with only one dissenting vote — see *Hearings on the Judicial Reform Act, S. 3055, etc., before the Senate Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary,* 90th Cong., 2d Sess. (1968), p. 70—and transmitted to the Congress by Chief Justice Warren. *Report on the Powers and Responsibilities of the Judicial Councils.* H. Doc. No. 201, 87th Cong., 1st Sess. (1961) (cited hereafter as *Report*). That report is such a comprehensive study of the background of judicial councils, of the legislative history of the 1939 statute that brought them into being, and of the present understanding of their proper function that its full text has been reproduced, as a convenience for

the Court, as an Appendix to this Brief. That report makes it very clear that judicial councils were created as a part of a "correlated scheme being enacted, for 'The Administration of the United States Courts.'" *Report* 4. The judicial councils were "an instrument of intended importance in the administration of the Federal court system * * *." *Report* 7.

The administrative nature of the powers of the judicial councils was no latter-day perception. The report of the House Judiciary Committee on the 1939 legislation said, with particular reference to the provision for judicial councils, that it was intended "to furnish to the Federal courts the administrative machinery for self-improvement * * *." H. Rep. No. 702, 76th Cong., 1st Sess. (1939), p. 2. When the legislation came before the Senate Judiciary Committee, the late Alexander Holtzoff, who, as Special Assistant to the Attorney General, was active in pressing for enactment of it, testified as follows:

> There is a mandatory clause in the bill requiring the district judges to accept and follow the directions of the judicial council. To this extent they are responsible for the administrative side of the Federal judiciary and for dispatching the work of the courts in a business-like manner and expediting the decision of cases.

*Hearings on Administration of United States Courts before a Subcommittee of the Senate Judiciary Committee,* 76th Cong., 1st Sess. (1939), p. 36.

When the 1961 report of the Judicial Conference Committee was published as a House Document, Representative Celler prepared a Foreword to it. In it he said that it was important and urgent "that the judicial councils in all circuits discharge their broad

administrative functions as contemplated and authorized by the Congress." *Report* v. Again he said:

> Since I, at the time, was a member of the Committee in the Judiciary of the House, I know it was the intention of the Congress to charge the judicial councils of the circuits with the responsibility for doing all and whatever was necessary of an administrative character to maintain efficiency and public confidence in the administration of justice.

*Report* v. Finally he said that "by placing responsibility and authority in the councils of the circuits, administrative power in the judicial branch was decentralized, as it ought to be, and in each circuit kept in the hands of judges of the circuit." *Report* vi.

This understanding that the power of a judicial council is administrative, not judicial, is shared by scholars. See Comment, *Removal of Federal Judges — New Alternatives to an Old Problem,* 13 UCLA L. Rev. 1385, 1406 (1966); cf. Currie, *Federal Courts: Cases and Materials* 231 (1968). Indeed from a thorough study of the literature it appears that it has never been suggested, prior to the filing of the Solicitor General's Brief, that a judicial council is a judicial tribunal or that the actions it takes are in any sense judicial rather than administrative.

An examination of the statutes giving powers to judicial councils fully supports this understanding about the nature of their function. The most important of these, of course, is 28 U.S.C. § 332, creating these agencies, and providing:

> Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its

> circuit. The district judges shall promptly carry into effect all orders of the judicial council.

In addition to this general provision there are many other statutes vesting particular functions in judicial councils. A judicial council may tell a district judge where he is to make his abode. 28 U.S.C. § 134(c). It may make necessary orders if the district judges in any district are unable to agree upon the division of business among them. 28 U.S.C. § 137. The judicial council must consent to the pretermission of any regular session of a district court. 28 U.S.C. § 140(a). Court quarters and accommodations can be provided by the Administrator of General Services only if they have been approved as necessary by the judicial council. 28 U.S.C. § 142. No designation and assignment of a circuit or district judge in active service to sit elsewhere can be made without the consent of either the chief judge of the circuit or the judicial council. 28 U.S.C. § 295. The judicial council may certify to the President that a circuit or district judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability, and, if the President agrees, an additional judge can then be appointed. 28 U.S.C. § 372(b). The judicial council may direct where the records of district courts and of the court of appeals are to be kept. 28 U.S.C. § 457. The judicial council must approve every plan for furnishing representation for defendants under the Criminal Justice Act. 18 U.S.C. § 3006A(a). Finally the judicial council has a variety of powers with regard to referees in bankruptcy, 11 U.S.C. §§ 62(b), 65(a), (b), 68(a), (b), (c), 71(b), (c), including the power to remove for cause a referee. 11 U.S.C. § 62(b).

The Solicitor General argues that a judicial council

is a judicial tribunal "at least insofar as a Council is acting to direct the conduct of judicial business by district judges." A great many of the powers just listed involve the direction of the conduct of judicial business at least as much as do the orders of the Tenth Circuit Judicial Council. We can properly dismiss as an imaginary horrible any suggestion that to hold that a judicial council is a judicial tribunal would swamp this Court with applications like this one directed at a multitude of orders by judicial councils. It is less easy to dismiss the impression that all of these powers are administrative in nature and not susceptible of a judicial determination.

This Court has been consistently faithful to the rule Justice Story suggested long ago:

> In reference to judicial tribunals, an appellate jurisdiction, therefore, necessarily implies, that the subject-matter has been already instituted in and acted upon by some other court, whose judgment or proceedings are to be revised. This appellate judisdiction may be exercised in a variety of forms, and indeed in any form in which the legislature may choose to prescribe; but, still, the substance must exist, before the form can be applied to it. To operate at all, then, under the constitution of the United States, it is not sufficient that there has been a decision by some officer or department of the United States; it must be by one clothed with judicial authority, and acting in a judicial capacity.

2 Story, *Commentaries on the Constitution of the United States* § 1761 (3d ed. 1858). The usual conclusion of the Court has been that whether the body whose decision it is sought to have reviewed was a "court" or whether its authority was "judicial" de-

pends on whether its proceedings followed the customary forms of the law, instituted and conducted throughout according to the regular course of judicial procedure. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court,* 1962 Sup.Ct.Rev. 153, 166-167. See also *Tutun* v. *United States,* 270 U.S. 568, 576-577 (1927).

The Solicitor General suggests that "a judicial council is no more and no less than the court of appeals for the particular circuit sitting *en banc.*" (Sol.Gen. Br. 18.) It is true that the statutory definition of a judicial council, 28 U.S.C. § 332, and the statutory definition of a court of appeals en banc, 28 U.S.C. § 46(c), are the same. This need not always be the case. From the inception of the idea of judicial councils to the present there has been considerable sentiment for including some district judges on the judicial council. *Hearings on the Judicial Reform Act, S. 3055, etc., before the Senate Subcommittee on Improvements in Judicial Machinery, Committee on Judiciary,* 90th Cong., 2d Sess. (1968), pp. 33. 60-79. Presumably this would make no difference since the judicial council, however constituted, certainly has many powers that would not be "cases" or "controversies" within the meaning of Article III, § 2, and if the judicial council can be regarded as a " court" in any sense it must be as a non-Article III court. That in itself would not bar review here.

But the fact that an act is done by a judge or by a court does not mean that the act is a judicial one or that it is within the appellate jurisdiction of this

Court.[2] *United States v. Ferreira,* 13 How. 40 (1851), was an attempt to review the determination of a district judge in which, as authorized by statute, he passed on certain claims under a treaty and then transmitted his recommendation to the Secretary of the Treasury for final approval. The Court, speaking through Chief Justice Taney, held that the award by the judge was not reviewable.

> It is too evident for argument on the subject, that such a tribunal is not a judicial one, and that the Act of Congress did not intend to make it one. The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges, referred to in the law, merely as a designation of the persons to whom the authority is confided, and the territorial limits to which it extends. The decision is not the judgment of a court of justice. It is the award of a commissioner.

13 How. at 47. See also *Hayburn's Case,* 2 Dall. 409 (1792); *Gordon* v. *United States,* 2 Wall. 561 (1865).

The case of *In re Metzger,* 6 How. 176 (1847), grew out of a treaty between the United States and France providing that this country would, on demand, extradite persons accused in France of certain crimes. The treaty further provided that this should be done only when the fact of the commission of the crime was sufficiently established that, if the crime had been committed here, there would be probable cause for

[2]Counsel for respondent and his wife were married by the late Judge Charles E. Clark, acting under the authority of a Connecticut statute. Surely in performi .g that ceremony Judge Clark was not deciding a case or controversy within Article III, § 2, and his action would not be subject to appellate review.

arrest and commitment for trial. When extradition of Metzger was demanded, the executive branch referred it to the judgment of a judicial officer. A district judge held a hearing in chambers and determined that there was good ground for extradition of Metzger. It ordered him apprehended and committed to be delivered up to the French authorities. He sought habeas corpus in this Court, but the Court held it was without jurisdiction.

> There is no form in which an appellate power can be exercised by this court over the proceedings of a district judge at his chambers. He exercises a special authority, and the law has made no provvision for the revision of his judgment. It cannot be brought before the District or Circuit Court; consequently it cannot, in the nature of an appeal, be brought before this court. The exercise of an original jurisdiction only could reach such a proceeding and this has not been given by Congress, if they have the power to confer it.

5 How. at 191-192.

The courts of appeals are created by 28 U.S.C. § 43(a). The judicial councils are created by 28 U.S.C. § 332. That their personnel are the same is not a happenstance. As the Solicitor General very properly points out, Congress deliberately intended to give administrative power over the courts to an instrumentality within the judicial branch. (Sol.Gen.Br. 18-20). But this does not make the council a court nor does it make its function judicial. The familiar language of Justice Holmes in *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908), points the way to decision.

> But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken

> place with a body which, at another moment, or in its principal or dominant aspect, is a court such as is meant by § 720. A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind. * * * Proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stat. § 720, no matter what may be the general or dominant character of the body in which they may take place. * * * That question depends not upon the character of the body, but upon the character of the proceedings.

Of the many powers conferred on judicial councils, listed earlier, there is only one — the power to remove for cause referees in bankruptcy — that "investigates, declares, and enforces liabilities as they stand on present or past facts" and that can properly be regarded as judicial. The Solicitor General detects an analogy between the orders involved in this proceeding and a disbarment proceeding. (Sol.Gen.Br. 20-21.) But disbarment, like removal of a referee, looks to the past. It has consequences in the future, but so too does a criminal conviction, and a criminal trial is surely "judicial" in nature.

Each of the powers of a judicial council "looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power." These powers are legislative, or administrative, in nature. The judicial

council may well look to the past to decide what the rule for the future should be. "Most legislation is preceded by hearings and investigation." 211 U.S. at 227. When a judicial council tells a district judge that he is to dispose of his pending cases before taking on new ones, or that he is to live at a particular place in the district, or that he may pretermit a regular session of his court, it is announcing the rule that is to be followed from that point on. The judicial council is wholly powerless to punish a district judge for past acts of which it disapproves. It has full power to tell a district judge what he must do in the future and it is then the duty of the district judge to "promptly carry into effect all orders of the judicial council." 28 U.S.C. § 332.

An order of a judicial council is very much like an order of a court of appeals reviewing a determination by the Commissioner of Patents. It "is not a judicial judgment. It is a mere administrative decision. It is merely an instruction to the Commissioner of Patents by a court which is made part of the machinery of the Patent Office for administrative purposes. In the exercise of such function it does not enter a judgment binding parties in a case as the term case is used in the third article of the Constitution." *Postum Cereal Co., Inc.* v. *California Fig Nut Co.*, 272 U.S. 693, 698-699 (1927).

In *United States* v. *First City Nat. Bank of Houston*, 386 U.S. 361, 369-370 (1967), this Court was able to find that the role assigned to the courts by the Bank Merger Act of 1966, 12 U.S.C. § 1828(c), was a "judicial" one. It noted that "the courts are not left at large as planning agencies." The standards to be applied were familiar ones and well within "the area of

judicial competence." But the judicial councils are left at large as planning agencies. There are no familiar standards to be applied. The decisions judicial councils must make are administrative decisions wholly outside the area of judicial competence.

It may be objected that Judge Chandler will be without a remedy if this Court must dismiss the present petition as an impermissible attempt to invoke its original jurisdiction. As the Solicitor General points out, "necessity cannot create jurisdiction." (Sol.Gen. Br. 28.) In the *Postum Cereal* case it was argued that refusal of review in the Supreme Court, on the ground that the action below was administrative rather than judicial in character, would leave the appellant without any remedy. Chief Justice Taft replied: "Even if this be so, as to which we express no opinion, it cannot furnish a reason for exceeding the constitutional powers of this court." 272 U.S. at 701. See also *Ex parte Peru,* 318 U.S. 578, 583 n. 3 (1943).

In *Marbury* v. *Madison,* 1 Cranch 137, 163 (1803), Chief Justice Marshall assured Marbury that the law of the land provided him a remedy — but he neglected to specify what it might be. The portion of section 13 of the First Judiciary Act authorizing writs of mandamus to persons holding office under the authority of the United States was expressly limited to the Supreme Court. It would have required considerable prescience on Marbury's part to look 35 years into the future and realize that the Circuit Court of the District of Columbia had inherited from Maryland the common law power to issue mandamus. See *Kendall* v. *United States* ex rel. *Stokes,* 12 Pet. 524 (1838).

In truth it is unlikely that Judge Chandler will be

without remedy if this action is dismissed. If, as we have argued, a judicial council is an agency exercising administrative powers, relief in the district court would seem to be available under 28 U.S.C. § 1361. The members of the Judicial Council could not sit on an appeal, 28 U.S.C. § 455, but this is not an insuperable objection. Judges from elsewhere could be designated to serve as the court of appeals, 28 U.S.C. § 291(a), or this Court could grant certiorari prior to decision by the court of appeals. 28 U.S.C. § 1254(1). For reasons set forth in the next portion of this Brief, it seems clear that Judge Chandler is not entitled to any relief, but if we are wrong about this, he has a remedy that does not violate the constitutional limits on the jurisdiction of this Court.

Our argument in this section has been addressed solely to the constitutional barriers to jurisdiction. For substantially the reasons advanced by the Solicitor General (Sol.Gen.Br. 21-31), we agree, though not without considerable doubt, that if this proceeding is within the appellate jurisdiction of this Court, the All Writs Act, 28 U.S.C. § 1651(a), provides statutory authority for the exercise of that jurisdiction. But in our view, this is not within the appellate jurisdiction and the Constitution precludes this Court from hearing the case within its original jurisdiction.

## II. The Orders Of The Judicial Council Now In Effect Are Valid.

In this portion of the Brief we agree with the Solicitor General (Sol.Gen.Br. 31-51) that in the present posture of the case petitioner is not entitled to any relief. Our reasons for this conclusion are substantially those put forward by the Solicitor General and, in-

sofar as possible, we will not repeat what he has said.

There is no occasion now to defend the substance of the order of December 13, 1965, or the procedure by which it was adopted. That order was expressly superseded by the order of February 4, 1966. (Statement 27.) But the briefs filed by Judge Chandler, by his counsel, and by Mr. Shipley employ vigorous rhetoric in their attack on the Judicial Council. The Judicial Council is accused of "unbridled usurpation and abuse of judicial power flagrantly violative of all American precepts of judicial ethics and propriety" (Shipley Br. 5), of "the most shocking un-American proceeding ever conducted by members of the Federal judiciary" (Chandler pro se Brief 3), and of many other equally unattractive things.

Because of the warmth of the attack, a word of defense is justified. It may well be, as the Solicitor General argues, that "no tribunal can be allowed by summary, *ex parte* procedures to assert non-feasance or misfeasance and to strip a federal judge of the incidents of his office." (Sol.Gen.Br. 37.) But the order of December 13th expressly provided that it was to be effective "until the further order of the Judicial Council." (Statement 3.) The Judicial Council, through its distinguished former counsel, informed this Court that it was intended that the December 13th order would be "temporary only, pending prompt further proceedings inquiring into the administration by Judge Chandler of judicial business in the Western District of Oklahoma. * * * The order of December 13 was issued because, in the view of the Judicial Council, Judge Chandler should not discharge the duties of his office during the period while the conduct of his office was thus in question." (Memorandum for the

Respondent in Opposition to the Application for Stay 2-3.) Solicitor General Marshall further told the Court that "public confidence in the federal judiciary would inevitably be impaired if Judge Chandler were to preside over the District Court for the Western District while the question of his present fitness to serve in that capacity is under consideration." (Id. at 3.) Reasonable men could well support this position. To act first and hear later is a "drastic procedure" and imposes "a heavy responsibility to be exercised with disinterestedness and restraint." *Kennedy* v. *Mallonee*, 332 U.S. 245, 253-254 (1947). But there are circumstances under which the power exists. Even assuming arguendo that the present Solicitor General is right, and that the power did not exist in this instance, an honest mistake about the propriety of the procedure followed by the Judicial Council does not warrant the harsh language in which its action is now being described.

In the first of his two briefs amicus, Mr. Shipley makes the point that "no evidence dehors the record may be considered. The order itself and the admissions of Respondent made in this action constitute the entire record." (Amicus Br. 3.) This seems entirely right. It is on just this premise that counsel for respondent has confined his preparation entirely to the documents on file in this Court and has not discussed with any member of the Judicial Council the background that led to the Council's action. The suggestions in the briefs of the petitioner and of Mr. Shipley of improper motivation on the part of the members of the Judicial Council seem inconsistent with this salutary principle.[3]

[3]So too does the suggestion of Mr. Shipley in his more

Nor is it apparent that as a matter of substance the temporary order of December 13, 1965, was beyond the power of a Judicial Council. Certainly there must be some circumstances in which it would be proper to order a judge to take no judicial action whatever for the time being. Suppose, for example, that a federal judge were indicted for income tax evasion. Presumably he would refuse to sit until his case was tried and he was either convicted or vindicated. But if he should fail to do so, and were to continue sitting, the judicial council would be derelict if it did not order him not to sit during the pendency of his own case. Judicial councils are charged with taking any action needed for "the avoiding of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system * * *." *Report* 9. The hypothetical example is not this case — but if, as the example suggests, the power exists, the question of when it should be exercised becomes one of wise judgment.

Even if it be assumed that the order of December 13th was invalid, it can hardly be of interest to this Court now. It was in effect for 55 days. It has been expressly superseded for nearly three years. Surely this case poses no occasion for this Court to investigate the problems of the meaning of "good Behavior" or whether impeachment is the only constitutionally permissible means to remove federal judges. These are a

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recent brief (Motion for Leave to File Brief and Brief of Amicus Curiae 10-12) that this Court should judicially notice "a confidential House Committee Print" from which he quotes extensively. Counsel for respondent has never seen the document nor, so far as he knows, has the Judicial Council. The notion of this Court judicially noticing confidential documents of another branch of government is not an attractive one.

fascinating subject for scholarly speculation. E.g., Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History,* 36 U.Chi.L.Rev. 665 (1969); Stolz, *Disciplining Federal Judges,* 57 Calif.L.Rev. 659 (1969); Shartel, *Federal Judges — Appointment, Supervision, and Removal — Some Possibilities Under the Constitution,* 28 Mich.L.Rev. 485, 723, 870 (1930). They are not ripe for decision in the present case.

There is a curious suggestion in the briefs supporting petitioner's position that the assumed validity of the December 13th order has tainted all that has occurred since, and that subsequent actions of the Judicial Council, quite clearly within their powers, are void because they are fruit of the poisonous tree.[4] The details of the argument are never made clear and it is difficult to follow.

The order of February 4, 1966, was within the powers of the Judicial Council under both § 137 and § 332 of the Judicial Code. It accepted the division of future cases agreed to by all the judges of the district court, including Judge Chandler. With regard to past cases, it accepted the view of Judge Chandler rather than that of his colleagues on the district bench. There was a suggestion earlier in this long litigation that "Judge Chandler and the other district judges in his court all acted under duress when they reached an agreement over the division of new cases filed in their court." (Petitioner's Reply to Memorandum for Respondent, and Petitioner's Suggestion That His Petition Has Not Become Moot 4.) Any duress on the other judges

[4] We apologize for the "time-worn metaphor," *Harrison v. United States,* 392, U.S. 219, 222 (1968), but in this context it seems apt

is wholly speculative and outside the record. In any event, it is irrelevant. There was no compulsion on Judge Chandler to agree to that division of the new cases. And even if the December 13th order was a form of duress on January 25, 1966, when the judges of the district court decided on the division of cases, that order had been superseded, and there was no conceivable duress, on September 1, 1967, when all of the judges, including Judge Chandler, in response to an invitation from the Judicial Council to propose a new division, reported that the existing division was "agreeable under the circumstances." (Statement 61.) In his latest brief filed by counsel, petitioner tells us that he went along with the division of new cases on January 25, 1966, as "his best strategy." But litigants are not entitled to play clever games in an effort to force this Court to decide a matter that no longer requires decision. Judge Chandler apparently concedes that if he had disagreed with the other district judges, and insisted on his right to hear new cases, there would have been a disagreement among the district judges and the Judicial Council would have had clear authority to act under 28 U.S.C. § 137. His argument that by agreeing to have no new cases assigned to him he in some fashion prevented the Council from giving him what in all respects he had contended for smacks of Alice in Wonderland.

Though it is of academic interest only, it is hard to see any force in petitioner's point that 28 U.S.C. § 137 extends only to new cases and that the Judicial Council has no authority to act if there is a disagreement among the district judges about cases already assigned. Consider this example. In a two-judge district, each judge is assigned 50 cases. The cases given Judge

A are easy. Many are settled, many result in pleas of guilty, and in a short time he has disposed of all of them. The cases given Judge B, by the random assignment process, are all difficult cases that are likely to lead to protracted litigation. Judge A offers to take some of Judge B's cases but Judge B disagrees. Would it not be entirely reasonable, under those circumstances, for the Judicial Council to say that it is in the public interest to use all its manpower to get the old cases decided, rather than having Judge A hear new cases while the cases on Judge B's docket grow gray with age? There is nothing in the text or the legislative history of the statute that is now § 137 that would bar a judicial council from taking such clearly sensible action.

But even if § 137 were never on the books, the February 4th order of the Judicial Council would be justified by § 332, a statute adopted long after the statute that is now § 137. As originally adopted, what is now § 332 made it "the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts." In its present form the statute authorizes the judicial council to make "all necessary orders for the effective and expeditious administration of the business of the courts within its circuit," and requires the district judges promptly to carry into effect these orders. Chief Justice Vinson wrote that:

> The councils are authorized by statute to "take such action thereon as may be necessary." This may take the form of investigation into the causes for delay, recommendations for transfer of judges into congested districts, or directions as to the assignment of cases within the district.

Vinson, *The Business of Judicial Administration,* 35 A.B.A.J. 893, 895 (1949). Chief Justice Burger, while still a circuit judge, said that "any problem — whatever it may be — relating to the expeditious and effective administration of justice within the circuit is within the power of the circuit judicial council." *Report* 6.

That the broad powers thus granted the judicial councils include the power to order a district judge not to take on any new cases until he has disposed of his pending cases has been taken for granted by all who have considered 28 U.S.C. § 332 and it is a power that has been exercised on other occasions. Lumbard, *The Place of the Federal Judicial Councils in the Administration of the Courts,* 47 A.B.A.J. 169, 170 (1961); Shafroth, *Modern Developments in Judicial Administration,* 12 Amer.U.L.Rev. 150, 160 (1963). The report of the special committee of the Judicial Conference lists as among the responsibilities of the councils "having a judge who has an accumulation of submitted cases not take on any further trial work until such cases have been decided." *Report* 10.

Chief Justice Taft observed long ago that "heretofore each judge has paddled his own canoe and has done the best he could with his district. He has been subject to little supervision, if any." Taft, *Adequate Machinery for Judicial Business,* 7 A.B.A.J. 453, 454 (1921). Supervision is essential if the courts are to preserve public confidence and esteem. Judicial independence is rightly cherished in this country, but this independence hardly extends to taking a vacation of five months every year, as Judge Lumbard has told us one district judge was doing not so long ago. Lumbard, *supra,* at 172. The matter was well put by Arthur

T. Vanderbilt, testifying in support of the legislation that is now 28 U.S.C. § 332:

> The difficulty is that we have inherited from primitive days, when transportation was slow and difficult, the theory that every judge was a law unto himself. He should be a law unto himself in the decision of cases, but should not be a law unto himself when it comes to matters designed to render service to the community.

*Hearings on Administration of United States Courts before a Subcommittee of the Senate Judiciary Committee*, 76th Cong., 1st Sess. (1939), p. 18.

The 1939 legislation was intended to provide a measure of supervision to assist the courts in providing maximum service to the community. The orders of the Tenth Circuit Judicial Council on February 4, 1966, and September 14, 1967, are well within the powers granted by that legislation. They pose no threat to the independence of the judiciary.

## Conclusion

For the reasons set out above, the motion for leave to file a petition for an extraordinary writ should be denied.

Respectfully submitted,

CHARLES ALAN WRIGHT
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December 1, 1969

87th Congress, 1st Session - - - - - - House Document No. 201

# REPORT ON THE POWERS AND RESPONSIBILITIES OF THE JUDICIAL COUNCILS

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## A REPORT

OF THE

## JUDICIAL CONFERENCE OF THE UNITED STATES

WITH A

## FOREWORD BY THE CHAIRMAN

OF THE

## COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

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PRESENTED BY MR. CELLER

JULY 5, 1961—Ordered to be printed

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**H. Res. 250**

*In the House of Representatives, U.S.,*
*June 29, 1961.*

*Resolved*, That the report entitled "Report on the Powers and Responsibilities of the Judicial Councils", by the Judicial Conference of the United States, March 13, 14, 1961, together with a foreword by Honorable Emanuel Celler, chairman of the Committee on the Judiciary, be printed as a House document.

Attest:

RALPH R. ROBERTS, *Clerk*.

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## LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES,
*Washington, D.C., March 24, 1961.*

Hon. SAM RAYBURN,
*Speaker of the House of Representatives,*
*The Capitol, Washington, D.C.*

DEAR MR. SPEAKER: Pursuant to the provisions of title 28, United States Code, section 331, I am transmitting herewith a report on the operation of the judicial councils of the circuits, provided for in title 28, United States Code, section 332, adopted by the Judicial Conference of the United States at a meeting held at Washington, D.C., March 13–14, 1961.

Respectfully,

EARL WARREN,
*Chief Justice of the United States.*

# FOREWORD

## By Hon. Emanuel Celler, Member of Congress

It is gratifying to receive from the Chief Justice this report of the Judicial Conference of the United States on the powers and responsibilities of judicial councils. It is important and urgent that the judges of the United States rid themselves of any lingering doubts on this subject and that the judicial councils in all circuits discharge their broad administrative functions as contemplated and authorized by the Congress.

The report of the Judicial Conference, which follows, accurately sets forth the legislative history of the laws enacted in 1939 which created the judicial councils of the circuits and the Administrative Office of the U.S. Courts, with all-inclusive responsibility for court management and judicial administration. Since I, at the time, was a member of the Committee on the Judiciary of the House, I know it was the intention of the Congress to charge the judicial councils of the circuits with the responsibility for doing all and whatever was necessary of an administrative character to maintain efficiency and public confidence in the administration of justice.

The Committee on the Judiciary, of which I am privileged to serve as chairman, has had in the past good reason to question whether the judicial councils have exercised the broad powers Congress conferred upon them by the enactment of section 332 of title 28 of the United States Code and whether the councils were as effective as they might be and were intended to be in maintaining the high standards desirable in judicial administration.

In past years many problems have been called to the attention of the Committee on the Judiciary which, in my judgment, should have been settled by the judicial council of the circuit and need never have been brought to the attention of the Congress if the judicial council had met the responsibility and exercised the powers conferred upon it by the Congress. I will mention only one example.

The Congress is not infrequently importuned to create additional judicial districts and divisions. Most of these demands originate from inadequate judicial service in the localities concerned. Nearly all of them could and should be remedied by action of the judicial council of the circuit in arranging and planning judicial assignments to provide an equitable distribution of the judgepower of the circuit.

The language of title 28, United States Code, section 332 was recommended to the Congress in 1939 by the judges themselves and was deliberately worded in broad terms in order to confer broad responsibility and authority on the judicial councils. It was the considered judgment of the Congress that the judicial councils were by their very nature the proper agents for supervising management and administration of the Federal courts. The councils are close

to all the courts of the circuit and know their needs better than anyone else and, by placing responsibility and authority in the councils of the circuits, administrative power in the judicial branch was decentralized, as it ought to be, and in each circuit kept in the hands of judges of the circuit.

There is an urgent need for the judicial councils in all circuits to recognize their full responsibilities and to perform more effectively the function originally intended by the Congress. This report by the Judicial Conference of the United States concludes that the present statute is adequate. There is, therefore, every reason to expect that in the future the judiciary will undertake to do their own housekeeping and not leave these responsibilities to the Congress or to some other agency to be authorized by the Congress.

I am convinced that if the recommendations in this report of the Judicial Conference are fully implemented and carried out by the judicial councils of the circuits there will result a wholesome and general improvement in the administration of the Federal judicial system, which is as much desired by the Congress as by the judiciary.

EMANUEL CELLER,
*Chairman, Committee on the Judiciary.*

# REPORT ON THE RESPONSIBILITIES AND POWERS OF THE JUDICIAL COUNCILS

**Adopted by the Judicial Conference of the United States at its spring session held March 13–14, 1961**

## Introduction

The Judicial Conference of the United States, at its September 1960 session, directed that a study and report be made on the responsibilities and powers of the judicial councils of the circuits, under title 28, United States Code, section 332, in the light of the background, history, expressions, experience, and other data existing as to the statute.

A special committee was appointed for this purpose—consisting of Chief Judge Harvey M. Johnsen of the Eighth Circuit, chairman; Chief Judge J. Edward Lumbard of the Second Circuit; Circuit Judge Richard T. Rives of the Fifth Circuit; Chief Judge Royce H. Savage of the northern district of Oklahoma; and Chief Judge Roszel C. Thomsen of the district of Maryland—and a report of its studies and conclusions was duly filed.

The Judicial Conference, after a thorough consideration of the report, which resulted in certain appropriate modifications, adopted the report at its session on March 13–14, 1961, and directed that it be published.

## I. Background of the Statute

Section 332 presently appears as part of chapter 15 in the Judicial Code, which is entitled "Conferences and Councils of Judges." This convenient grouping into a separate chapter of the various provisions existing in the code for judicial conferences and councils, together with the simplification and change engaged in as to some of the original language, which was done by the revision and codification act of 1948, possibly has tended to dim a little the setting and the context in which the provision for judicial councils was initially enacted.

The provision for judicial councils of the circuits came into being as a section of Public Law No. 299, approved August 7, 1939 (53 Stat. 1223), whose enacting clause read:

> That the Judicial Code is hereby amended by adding at the end there of a new chapter to be numbered XV and entitled "The Administration of the United States Courts," as follows:

Sections 302 to 305 of this new "Chapter XV—The Administration of the United States Courts" contained the provisions for the establishment, structure, and functions of the present Administrative Office

of the U.S. Courts. Section 306 followed, coordinately and relatively, with provision for another instrumentality in the statutory scheme of "The Administration of the United States Courts."

The provisions of section 306, as here pertinent, were:

> To the end that the work of the district courts shall be effectively and expeditiously transacted, it shall be the duty of the senior circuit judge of each circuit [now designated as chief judge] to call at such time and place as he shall designate, but at least twice in each year, a council composed of the circuit judges for such circuit who are hereby designated as a council for that purpose * * *. The senior judge shall submit to the council the quarterly reports of the Director [of the Administrative Office] required to be filed by the provisions of section 304, clause (2), and such action shall be taken thereon by the council as may be necessary. It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts. * * *

In the revision and codification made of the Judicial Code in 1948, this language was shortened; a sentence was added that "The council shall be known as the Judicial Council of the circuit"; the word "directions" was changed to "orders"; and the expression "To the end that the work of the district courts shall be effectively and expeditiously transacted," etc., was rephrased and constituted into a separate paragraph, which is the final paragraph in present title 28, United States Code, section 332, and which reads:

> Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within the circuit. The district judges shall promptly carry into effect all orders of the judicial council.

The change of the word "directions" to "orders" would seem to have been one of form and emphasis rather than of substance, in view of the edict contained in the original statute that "It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts." Thus, there has occurred no change of substance in the statute since its original enactment, except that, by the substitution made of the expression "the effective and expeditious administration of the business *of the courts within the circuit*" (emphasis supplied), for the previous phrases of "the work of the district courts" and "the administration of the business" of these "respective courts," it can perhaps be argued that the provisions of the section now are as specifically applicable to a court of appeals, under the general term "the courts within its circuit," as to a district court.

The point here, however, is that the background, history, and expression from which the original statute emerged are as significant in relation to the present statute as in their lighting of the purpose and scope of the initial enactment.

The relationship existing under Public Law No. 299 between the creation of the Administrative Office of the U.S. Courts and the establishment of judicial councils of the circuits, as instrumentalities in "The Administration of the United States Courts," has been referred to above. In examining the purpose which the judicial councils thus were designed to serve, it is of fundamental interest to note why and how the provision for them came to be made a part of the statute.

At the time of the September 1938 session of the Judicial Conference, there had been pending in the Congress a measure, known as the Ashurst bill, sponsored by the Attorney General, and having

as its objectives (in the characterization made by the Judicial Conference report) (1) "to give the courts the power of managing their own business affairs [budget, supplies, etc.] and to that extent relieve the Department of Justice of that responsibility," and (2) "to secure an improved supervision of the work of the courts through an organization under judicial control." [1]

Some of the judges throughout the system were in disagreement or doubt as to the desirability of lodging in such an administrative organ the powers provided for in the bill, even though the office was to perform its functions under the control of the judiciary itself. Members of the Supreme Court also were opposed to the measure as it stood, because of their view that the responsibility for the functioning of the Administrative Office and the proper exercising of the powers set up in the bill would fall on that Court and could cast upon the Chief Justice the necessity and burden of becoming involved at local levels in the complaints, problems, and questions which might arise—thus "possibly making the Chief Justice and the Court itself a center of attack."

In the September 1938 conference, Chief Justice Hughes took occasion to discuss these difficulties in relation to the scope and purpose of the bill, which he characterized as extending to—

> the discovery of the needs of the courts, not merely from an administrative point of view in its more restricted sense, but discovery of unnecessary delays, of inefficiency and *of all the various matters relating to the work of the judges which may be regarded as important to a more ideal administration of justice in the Federal courts.* [Emphasis supplied.]

He then made the following proposal to the Conference:

> Now, my thought has led me to this consideration: I think the difficulty in this present bill lies in an undue centralization * * *. My thought is that there should be a greater attention to local authority and local responsibility. It seems to me that * * * we have in the various circuits foci of Federal action from the judicial standpoint for supervision of the work of the Federal courts.
>
> Instead of centering immediately and directly the whole responsibility for efficiency upon the Chief Justice and the Supreme Court, I think there ought to be a mechanism through which there would be a concentration of responsibility in the various circuits—immediate responsibility for the work of the courts in the circuits, with power and authority to make the supervision all that is necessary to induce competence in the work of all of the judges of the various districts within the circuit.
>
> Now we have had in the States considerable effort in this direction through the appointment of judicial councils. * * * My thought is that in each circuit there should be an organization *which will have direct and immediate responsibility with regard to the judicial work in that circuit.* [Emphasis supplied.]
>
> My suggestion for your consideration is that there should be in each circuit a judicial council. * * *
>
> * * * * * * *
>
> When you come to the supervision of the work of the judges, * * * there you have the great advantage of the supervision of that work by the men who know. The circuit judges know the work of the district judges by their records that they are constantly examining, while the Supreme Court gets only an occasional one. And the circuit judges know the judges personally in their districts; they know their capacities. And if complaints are made, they have immediate resort to the means of ascertaining their validity. That direct supervision can be made very effective, and I think far more so than the more remote supervision, entailing a great deal of labor and circumlocution, imposed upon the Chief Justice.[2]

[1] Report of the Judicial Conference, September session, 1938, p. 12.

[2] These quotations, and those which have preceded them, have been extracted from Transcript of the Proceedings of the Judicial Conference, Sept. 30, 1938, pp. 174-192.

The Judicial Conference approved this suggestion of Chief Justice Hughes and made provision for a committee to prepare a legislative measure—

having in view the incorporation of the provisions of the present bill looking to the transfer of the budget from the Department of Justice to the administration of the courts by some proper means, and likewise embracing a provision looking toward the establishment of judicial councils or some other like method within the several circuits and the District of Columbia *for the control and improvement of the administration of justice therein.*[3] [Emphasis supplied.]

The committee thus created collaborated with a committee appointed by the Attorney General in the preparation of a bill, which was introduced in the Senate as S. 188, 76th Congress, 1st session, and which, with some minor changes, became Public Law No. 299. It should be noted here, however, that the provisions of the section on judicial councils represented the concept and the product of the members of the Committee of the Conference, under the directions given them as set out above, and that no change whatsoever was made by Congress in the provisions or in the language which the Committee proposed. Congress enacted the section dealing with judicial councils precisely as the committee had formulated it. It thus gave to the judiciary, in exact form and content, what the Committee of the Conference, under the responsibility imposed upon it by the Conference, was convinced, and held out to the committees of the Congress, embodied the responsibility and had the capacity to function as an effective instrumentality in the correlated scheme being enacted, for "The Administration of the United States Courts."

## II. Legislative History of the Statute

In seeking to gain the acceptance of Congress for the provision for judicial councils, as well as for the provisions of the bill generally, various members of the Committee of the Conference testified before the congressional committees.

Chief Justice Groner of the Court of Appeals for the District of Columbia, who was Chairman of the Conference Committee, spoke of the considerations engaged in at the September 1938 session of the Conference, which had prompted the appointment of the Committee and which had entered into the Committee's drafting result, as follows:

There was a general recognition of the fact that, altogether aside from the question of the administration of the funds of the courts, there was a feeling on the part of the judges and a large part of the members of the bar that there ought to be some method of compiling the statistics of the work of the courts, and of keeping abreast of the work by bringing those statistical figures to the attention of some organization of the courts which could apply corrective measures when they were necessary.

* * * * * * *

The additions in the bill over the former bill are in a provision which creates in each circuit what is called a judicial council, composed of all the circuit judges in the circuit. The provisions in relation to the duties of the judicial council, condensed, are that the administrative officer shall examine the state of the dockets, shall ascertain the cause of apparent delays in the disposition of cases, the time which the judges give to the trial of cases, and the whole subject of the work of the district courts, and once in each quarter he is required to put that information together, with his comments in the form of a report, which he submits to the newly instituted judicial council.

* * * * * * *

[3] Report of the Judicial Conference, September session, 1938, p. 12.

The bill provides that it shall then be the duty of the judicial council in each circuit to consider the report of the administrative officer, and promptly to take such action as may be necessary to correct whatever is made the subject of criticism therein. * * *

So far as I know personally, the criticism of the courts is due to delay. I have not heard, except perhaps in one or two instances, any substantial criticism of the work of the courts, except that the length of time which ensues between the commencement of a suit and its conclusion is too long, particularly the delay which exists in one or two or three or four districts in the country.

Those matters this bill undertakes to provide for by outlining certain duties of the judicial council. Under the present judicial setup we have no authority to require a district judge to speed up his work or to admonish him that he is not bearing the full and fair burden that he is expected to bear, *or to take action as to any other matter which is the subject of criticism, or properly could be made the subject of criticism, for which he may be responsible.*

The bill also provides what is not now true, that it shall be the duty of the district judge, when admonished or when matters are otherwise brought *to his attention by the judicial council, to take whatever steps are thought to be necessary or declared to be necessary to correct those things which ought not to exist in a well-run judicial system.*[4] [Emphasis supplied.]

This part of the testimony of Judge Groner was formally incorporated into Senate Report No. 426, which was made to accompany S. 188, in Congress consideration of the bill. Judge Groner added a comment, in concluding his testimony, to the effect that representatives of the Administrative Office should be able to be of assistance informationally to the judicial councils in "finding out, in regard to delays or any other matters of comment or criticism, the cause of it * * *."[5] He made reference also at the end of his testimony, as he had done at the start, to the duty and responsibility of the courts, in preserving the independence of the judiciary, "of protecting themselves against the criticism or against those things which produce criticism" and "of maintaining the general and universal confidence of the people in the courts,"[6] and indicated his belief that the provisions of the bill would help to serve that end.

There was testimony of similar effect by other members of the Conference Committee, as well as by other judges and lawyers. The late Judge John J. Parker, a member of the Conference Committee, stated, in his testimony at the hearings before the Committee of the Judiciary of the House of Representatives, 76th Congress, 1st session, page 22:

Judge PARKER. This (council) can deal with all sorts of questions that arise in the administration of justice.

Mr. CELLER. Do you put any restraint on the council at all?

Judge PARKER. I do not think this bill does. Of course, I assume this is true: That the councils will be restrained by the inherent limitations of the situation. They would know that, if they commanded a judge to do something, unnecessarily or unwisely, he would refuse to do it, and that would probably be the end of the matter.

It is unnecessary here to go further into the testimony before the congressional committees. The general purport of all this may concludingly be summarized in the expression made by the late Arthur T. Vanderbilt, a member of the Attorney General's Committee which collaborated with the Committee of the Conference, the then president of the American Judicature Society, and a former president of the American Bar Association:[7]

[4] Hearing before the Subcommittee of the Committee on the Judiciary of the Senate, Apr. 4 and 5, 1939 on S. 188, pp. 9, 10, 11.
[5] Id., p. 14.
[6] Id., pp. 14 and 9.
[7] Id., p. 16.

I would like to point out that the present bill has a great advantage over the bill that was introduced last year, and for that I think the credit must go to the Chief Justice and the other members of the Supreme Court, in that it does not attempt to centralize all the business affairs of the Federal courts in Washington, but rather creates a system of decentralization in recognizing the circuit courts of appeals, 11 of them, * * * *as the operating units in bringing about the proper administration of justice.* This bill has at least that very great advantage that, the circuit judges being responsible for the condition of the district courts within the circuits, have it within their power to know much more about what is going on in that circuit than could the Chief Justice or the Associate Justices of the Supreme Court here at Washington. I think the principle or the example there set is one which is very important and will be very helpful in the administration of the bill. [Emphasis supplied.]

It seems patent that what the Committee of the Conference intended, what its members and the other witnesses who testified held out to the committees of the Congress, and what the report which accompanied the bill reflected as being the legislative understanding and object of the provision, was that it imposed upon a judicial council the responsibility of seeing that the work and function of the courts in its circuit were expeditiously and effectively performed; and that this responsibility of observation, supervision, and correction went to the whole of a court's functioning, in both personal and institutional aspect.

In the language set out in Senate Report No. 426, page 4, extracted from one of the witnesses' testimony, the concept was—

that whatever is wrong in the administration of justice, from whatever source it may arise, is brought to the attention of the judicial council, that it may be corrected by the courts themselves.

## III. Literature on the Statute

The section on judicial councils does not appear to have been the subject of much outside expression, indicative of general legal view upon it.

At the 1958 Attorney General's Conference on Court Congestion and Delay in Litigation, however, Circuit Judge Warren E. Burger commented as follows (Report of the Conference, pp. 9–10):

These [last] two sentences of section 332 * * * are in general terms, but they are all-embracing and confer almost unlimited power. Any problem—whatever it may be—relating to the expeditious and effective administration of justice within the circuit is within the power of the circuit judicial council.

Similarly, in an address before the National Conference of Judicial Councils in 1960 (reported in vol. 47, A.B.A. Journal, p. 169) Chief Judge J. Edward Lumbard, a member of this Special Committee, stated:

As this language [of sec. 332] is about as broad as it could possibly be, there is no doubt that the Congress meant to give to the councils the power to do whatever might be necessary more efficiently to manage the courts and administer justice.

Further, in an article appearing in the June 1960 American Bar Association Journal, Circuit Judge Prettyman made this characterization of the statute and its implications:

This statute is flat and unequivocal in conferring power. With the power goes corresponding responsibility. With responsibility goes corresponding duty.

The statute has also been referred to in the Report to the Senate Appropriations Committee, of April 1959, of the Field Study of the

Operations of United States Courts, made by staff member Paul J. Cotter, where, among other things, the observations were made (pp. 33 and 36):

> The objectives of this legislation, which was passed in 1939, appear quite clear. * * *
>
> * * * * * * *
>
> * * * It was the judiciary, for the most part, which urged Congress to enact the present law relating to the supervisory functions of judicial councils. It has been on the statute books for approximately 20 years without any requests for changes being made, and it would appear incumbent upon the judiciary to make it work or to request amendment to the present law.

## IV. Recognition of the Scope of the Statute Made in its Application and Use

The purpose of this report is to indicate the responsibilities and powers of the judicial councils as they exist under the present statute. It is not, therefore, necessary to go into the question of the number of times that the statute has affirmatively been used by the several councils. The special Committee of the Conference, appointed to make this study, has been able to obtain from each chief judge of the circuits individual examples of situations in which the statute has been employed, in order to examine the scope of the responsibility and power which has thereby been given recognition in its application.

These examples show a variety of situations in which the councils, mostly through having the chief judge deal with the matter in personal approach, have undertaken and effected corrections of things which lie within the full scope of the responsibility pointed out above.

In other words, most of the councils appear, from the things with which they have dealt in these situations, to have recognized that their responsibilities and power extend, not merely to dealing with the questions of the handling and dispatching of a trial court's business in its technical sense, but also to dealing with the business of the judiciary in its broader or institutional sense, such as the preventing of any stigma, disrepute, or other element of loss of public confidence occurring as to the Federal courts or to the administration of justice by them, from any nature of action by an individual judge or a person attached to the courts.

It might be observed, also, that while the various councils have perhaps not been as active generally as they might and should have been, the various actions they have taken indicate that at least some of them have been far more active and alert as to their responsibility than they have been given credit for being by the profession. This lack of cognizance of what they have done probably results from the informal manner in which their responsibility has been exercised—and ordinarily properly so—to accomplish their object.

## V. Other Statutes Indicative of the Intended Importance of Judicial Councils

The role of the judicial councils as an instrument of intended importance in the administration of the Federal court system is given emphasis, it is believed, by the recognition and function accorded them under a number of special statutes. It would needlessly prolong this report to enumerate and discuss all of these, but one example will

sufficiently serve in illustration. Thus, under title 11, United States Code, section 62(b), in the field of bankruptcy, the Council is given the power to make removal of a referee for cause, where the judges of a district court fail so to remove him by a concurrence of a majority of them.

## VI. Enforcement Powers of the Judicial Councils

Section 332 provides that the Council "shall take such action (on the quarterly reports of the Administrator) as may be necessary"; that it "shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit"; and that "The district judges shall promptly carry into effect all orders of the judicial council."

It will be noted that there is no express provision for sanctions in relation to the orders of the council. It is apparent from the testimony of the witnesses before the committees of Congress that this was deliberate on the part of the conference committee in drafting the section; that it was felt that the command of the statute, that all orders of the Judicial Council should be carried into effect, would be sufficient, in the nature and spirit of the judicial office, and in the tradition of the scheme of authority which has always existed in a judicial system, to cause those orders to be obeyed; and that any defiance of a council's order would be extremely rare; and that there would exist implicitly or inherently some way of dealing with it, if it occurred.

Thus, in the Senate committee hearings, Senator (now Circuit Judge) Danaher, in referring to the question of "lack of teeth," commented on the provision relating to the reports of the Director, that the Council may take such action as may appear to be necessary, and indicated that he felt that "that answered the question as to the teeth" (pp. 18 and 19). Arthur Vanderbilt replied, "I think it does quite completely and adequately." He added that, as to situations in which the admonition of the Council might not be respected, "Those cases are so rare that I do not think you would ever have to bother with them." And he had precedingly observed, "I think the circuit court and the judicial council would have adequate power to deal with such a situation" (p. 19).

The significance of this, in the view of the Judicial Conference, is merely to make it clear that the omission of any provision for specific sanctions was in no way intended to affect the Council's responsibility to exercise its supervisory and corrective functions or to prompt it to engage in any deterrence in respect thereto.

## VII. Conclusions

On the basis of the foregoing, the Judicial Conference of the United States is of the following views and conclusions:

(1) Under section 332, the judicial councils are intended to have, and have, the responsibility of attempting to see that the business of each of the courts within the circuit is effectively and expeditiously administered.

(2) The responsibility of the councils "for the effective and expeditious administration of the business of the courts within its circuit" extends not merely to the business of the courts in its tech-

nical sense (judicial administration), such as the handling and dispatching of cases, but also to the business of the judiciary in its institutional sense (administration of justice), such as the avoiding of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system, from the actions of a judge or other person attached to the courts.

(3) The councils have the responsibility and owe the duty of taking such action as may be necessary, including the issuance of "all necessary orders," to attempt to accomplish these ends.

(4) These responsibilities should ordinarily be approached, in the spirit and tradition of the judicial institution, in an attitude of attempted cooperation and assistance to the district courts and not of purported policemanship, since the purpose of the statute is to make the Council an instrument to help prevent problems from arising, to help find solutions for those which have arisen, as well as to take such corrective action for prevention or solution "as may be necessary."

(5) If the councils are effectively to serve these purposes, it is manifest that they must undertake to keep themselves informed. Their primary source of information will, of course, be the reports of the Director of the Administrative Office, as referred to in the statute. But formal statistics alone will not always, and perhaps not usually, be sufficient as a basis for the exercise of intelligent responsibility. Statistics may point out the existence of a problem, but they do not ordinarily demonstrate the causes or reasons underlying the problem. Thus, in the attempt to deal with a problem, such as where a court appears to be falling behind and perhaps to be approaching an incipient congestion, it would seem desirable for the Council to call upon the Administrative Office to undertake to make an exploration into the particular situation, in order to enable it to get at the underlying picture and understand what it is that needs suggestion or corrective action on the part of the Council.

(6) In the judgment of the Judicial Conference the present statute is adequate to enable the judicial councils, on proper exercise of their responsibilities, to serve their intended purpose, as an instrumentality in the statutory scheme of Public Law No. 299, for "The Administration of the U.S. Courts," to assist in achieving "the effective and expeditious administration of the business of the courts." The expression which the Conference made in the report of its September 1939 session, page 11, after the enactment of the act, is entitled to be renewed:

> It is confidently expected that through the operation of this act the important objectives to which reference has been made will be measurably attained.

## VIII. Suggestions and Comments

The Judicial Conference makes these suggestions and comments:

(1) The tasks of a judicial council might perhaps be made easier by gaining understanding and cooperation, through a discussion of its responsibilities and concerns, and its approach to them, at the judicial conference of the circuit. In this connection it should be noted that the purpose of these conferences, under title 28, United States Code, section 333, is—

> considering the business of the courts and advising means of improving the administration of justice within such circuit.

(2) Understanding of the functions and concerns of both the judicial councils and the judicial conferences of the circuits by the bar should be encouraged.

(3) Some formality in the holding of council meetings and the setting up of an agenda can perhaps contribute to their functioning. Too much informality may tend to a dilution of the sense of responsibility.

(4) Understanding of the work of the council and of the spirit of its approach to its responsibilities can perhaps be fostered by inviting the district judge, who is the representative on the Judicial Conference of the United States, to attend a council meeting. In this respect, the same purpose in comprehension will perhaps be served as to the council, as results to a court of appeals in calling a district judge at some time to sit with it and thereby become familiar with its processes.

(5) It is not possible to cover within the compass of this report all of the specific things which the Conference has discussed as falling within the responsibilities of the councils. These have included such matters as the responsibility of dealing with situations where a judge, eligible to retire, has become incapacitated, so that the work of the court is materially being prejudiced thereby. Another illustration is having a judge who has an accumulation of submitted cases not take on any further trial work until such cases have been decided. These specific matters could be numerously multiplied. For purposes of the present report, the all-inclusive general statements made above will have to suffice.

○

No. 2 Misc.

MAR 16 1970
JOHN F. DAVIS, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

---

STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE
FOR THE WESTERN DISTRICT OF OKLAHOMA, Petitioner,

v.

JUDICIAL COUNCIL OF THE TENTH CIRCUIT
OF THE UNITED STATES, Respondent.

---

ON PETITION FOR WRIT OF MANDAMUS
AND/OR PROHIBITION

---

## MOTION FOR LEAVE TO FILE REPLY BRIEF
## AND
## REPLY BRIEF

---

Stephen S. Chandler,
United States District Judge
United States Court House
Oklahoma City, Oklahoma 73101
*Petitioner,*
*Pro Se*

Washington, D. C. THIEL PRESS 202 393 0625

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

---

**No. 2 Miscellaneous**

---

STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, Petitioner,

v.

JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES, Respondent.

---

ON PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

---

## MOTION FOR LEAVE TO FILE REPLY BRIEF AND REPLY BRIEF

---

Prior to oral argument I regarded this case as one which needed no oral argument. No material defense had been set up, jurisdiction of the court was found in the All-Writs Act, and all facts necessary to the granting of the relief prayed for were shown by the record. I still view the case in that light.

However, in view of the interest shown at the time of oral argument in the broad legal and constitutional ques-

tions involved, I respectfully ask leave to file this short paper for the purpose of emphasizing matters of more universal importance than the resolution of this specific controversy.

The judges of the Court of Appeals of the Tenth Circuit sitting in a dual role as a Court of Appeals *and* as a Judicial Council on various occasions during the past thirteen years, have usurped and exercised jurisdiction *sua sponte* in specific private cases pending in district courts. Usually those cases involved vast sums of money. The judges held evidentiary hearings without due process and even without hearing made findings of fact and entered writs and orders at various stages of the *trial* process affecting cases pending in the district courts of the circuit "to effectuate what seems to us to be the manifest ends of justice". Thus, district judges were effectually relegated to the status of subordinate trial examiners.

This statement is not an exaggeration. The power assumed by the judges of the Court of Appeals is virtually *unlimited*, as this paper will demonstrate. The judges of this statutory court of limited appellate jurisdiction have constituted themselves a court of general jurisdiction, usurped the statutory functions of the district courts and completely circumvented the policy of Congress in the establishment of these constitutional inferior courts.

This extreme condition exists in no other circuit. I shall refer later to the condition in other circuits by the citation of no less eminent an authority than Professor Charles Alan Wright, counsel for Respondent.

The original *sua sponte* order of the Judicial Council in the instant case is not more astonishing than the progressive steps leading up to the complete usurpation of this tyrannical power. A very few decisions and orders of the Court of Appeals and Judicial Council of the Tenth Circuit will be sufficient to show the erosion of the independence of the district judges by the usurpation of power and jurisdiction to control or exercise *all* or *any* of their discretion-

ary acts at *every stage* of the trial process by what may factually be characterized as the "Tenth Circuit Double-Barreled Defamatory Supervisory Writ" which was concocted by the combination of four nonexistent jurisdictional powers: the nonexistent "supervisory" power vested in judicial councils by 28 U.S.C. 332; the nonexistent "appellate supervisory control of the district courts"; the nonexistent "*inherent* powers of appellate jurisdiction to effectuate what seems *to us* to be the manifest ends of justice"; and the nonexistent jurisdiction "to take action to guarantee a fair and impartial trial."

The decisions and orders of the Tenth Court of Appeals and Judicial Council referred to are not just remotely applicable to the instant case. They are an integral part of it, made so by specific reference thereto as the basis for the issuance of the order under attack here. The full significance of the unprecedented order under consideration in the instant case will be overlooked unless the similar writs and orders in these few closely related cases are clearly understood with the aid of a careful scrutiny of the briefs and records in the cited cases, *which are all on file in this court*, in each of which certiorari was unfortunately denied, thus delaying by many years the resolution by this Court of the vital questions involved here.

Greater by far is the judicial significance of each of these related cases than the Council order in the instant case which, in retrospect and in comparison, seems somewhat laughable. It is merely the proverbial straw that broke the camel's back. In each of the other cases the result to the private litigants was a miscarriage of justice and a monumental misuse of the judicial process.

The bellwether case is *United States v. Ritter*, 273 F.2d 30, 32 (C.A. 10, 1959), cert. den. 362 U.S. 950, 4 L.Ed.2d 869, 80 S.Ct. 863 (1960) and its Companion case, *Ritter v. Murrah*, 362 U.S. 946, 4 L.Ed.2d 866, 80 S.Ct. 873 (1960), the history of which is as follows:

In 1955 in *United States v. Hatahley*, 220 F.2d 666, the Court of Appeals reversed Chief Judge Ritter of Utah.

Certiorari was granted, *Hatahley v. United States*, 351 U.S. 173, 100 L.Ed. 1065, 76 S.Ct. 745 (1956). This Court reversed the Court of Appeals and remanded the case to the district court for the making of appropriate findings with reference to damages. In its opinion this Court stated, 351 U.S. page 177, 100 L.Ed. page 1072:

> "3. While the Government does not challenge particular findings, it does level a general charge that the trial was conducted in such an atmosphere of bias and prejudice that no factual conclusions of the court should be relied on. *The Court of Appeals noted 'that the case was tried in an atmosphere of maximum emotion and a minimum of judicial impartiality.'* 220 F.2d, at 670. After oral argument and *a thorough consideration of the record*, however, we do *not* find that the trial was conducted so improperly as to vitiate these findings."[1]

Upon remand the district judge took additional evidence, made findings of fact and entered judgment for damages. The United States again appealed to the Court of Appeals, *United States v. Hatahley*, 257 F.2d 920 (1958). The Court of Appeals found the damages awarded unsupported by the evidence and remanded the case for a new trial stating:

> "From his *obvious interest* in the case, illustrated by *conduct and statements made throughout the trial*, which need not be detailed further, we *are certain that the feeling of the presiding Judge* is such that, upon retrial, he cannot give the calm, impartial consideration which is necessary for a fair disposition of this unfortunate matter, and he should step aside. * * * we *suggest* that when the case is remanded to the District Court, the Judge who entered the judgment take appropriate preliminary steps to the end that further proceedings in the case be had before another Judge. See *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259, 77 S.Ct. 309, 1 L.Ed.2d 290."

[1] Italics herein added if not otherwise noted.

Judge Ritter was not intimidated by the gratuitous "uncomplimentary" statements of the Court of Appeals and its "suggestion" that he "step aside". He refused to abdicate his duty to exercise his jurisdiction as his conscience dictated. As stated by the Court of Appeals, 273 F.2d 32, he "took note of our suggestions that the case be heard before another judge but stated for the record that he did not 'intend to follow that suggestion so you can lay that to one side'." ("Supervisory suggestions" have at times also been made *orally* to district judges in the Tenth Circuit.

The United States thereupon filed an *original* Mandamus Action in the Court of Appeals, *United States v. Ritter*, 273 F.2d 30 (1959) to disqualify the judge for bias and prejudice. (No attempt was made to disqualify him in the district court for *personal* bias and prejudice in compliance with 28 U.S.C. 144.) Judge Ritter filed no response and did not appear either in person or by counsel, but counsel for the parties in interest appeared and resisted the Application. The Court of Appeals issued a Writ prohibiting Judge Ritter from proceeding further in the case and providing that the Chief Judge of the Circuit designate another Judge (one he would choose) to hear the case. In this connection the Court of Appeals said on page 32:

> "[1] Plaintiffs in the *principal* case take the position that the government's application is premature and untimely, and that in any event, extraordinary relief is unauthorized either under the all-writ statute, Section 1651, Title 28 U.S.C., or *appellate supervisory control* of the district courts. But we have *no doubt* of our *power and inescapable duty* to grant the relief sought, whether it be found in the all-writ statute or in the exercise of the *inherent* powers of appellate jurisdiction to effectuate what seems *to us* to be the manifest ends of justice. See *La Buy v. Howes Leather Co.*, supra."

The Judges of the Court of Appeals who were sitting *en banc* when this unauthorized Extraordinary Writ was

entered, immpediately put on their other hats and, as members of the Judicial Council *ex officio*, entered an identical Extraordinary Writ which they called an "Order". As stated in the Memorandum of Respondents filed in the *Companion* cases No. 761 and No. 823 Misc., October Term 1959, *Ritter, Chief Judge v. United States*, 362 U.S. 950, 4 L.Ed.2d 869, 80 S.Ct. 863 (1960) and *Ritter, Chief Judge v. Murrah, Chief Judge*, 362 U.S. 946, 4 L.Ed.2d 866, 80 S.Ct. 873 (1960):

> "*Immediately* after consideration by the Court of Appeals, the matter was further considered by the Judicial Council of the Tenth Circuit, convened pursuant to 28 U.S.C. 332. The order of the Council *found* (Pet., No. 823, Misc., p. 2a) that Judge Ritter has '*such bias and prejudice* * * * that he should proceed no further' in the case, and that *the 'effective and expeditious administration of the business of the District Court requires that the matter be heard by another judge.* The order of the Council directs (id., p. 3a) that Judge Ritter proceed no further in the case, and it requests the Chief Judge of the Circuit to designate and assign another judge from the District Court's bench."

Thus was whelped by the Judges of the Court of Appeals for the Tenth Circuit, acting *ex officio* as members of the Judicial Council, *their* new *double-barreled* jurisdiction. They thereby "legislated" to themselves complete and unlimited power and jurisdiction to "suggest" how a district judge should exercise his discretion in the trial of specific private litigation and if he will not bend to their will, the power to themselves exercise his discretionary function by the entry by the Court and Council jointly of the new "double-barreled" writ which they had just devised to replace him with another judge "hand-picked" by the Chief Judge.

There is no authority of law which authorizes the hand-picking of a successor district judge by the Chief Judge of the Circuit when a district judge becomes disqualified to

hear a case which has been regularly assigned to him under the rules of the district court made pursuant to Title 28 U.S.C. 137. The successor judge can legally be designated only as provided by the district court rules. Title 28 U.S.C. 292(b) is not applicable. A judge of another district assigned to hold court in a foreign district serves under the rules of the district court to which he is assigned. This practice in the Tenth Circuit is another arbitrary usurpation of power, dangerous in its implications.

In *Ritter* the Court of Appeals in an *original* action filed in that court made *findings of fact* of bias and prejudice without due process or competent evidence and in plain words said that it made no difference whether it had jurisdiction under the All-Writs Statute because it could enter the Extraordinary Writ "in the exercise of the *'inherent' powers of appellate jurisdiction* to effectuate what seems *to us* to be the manifest ends of justice", (citing *La Buy*). This Extraordinary Writ was entered by the Court in an *original* action filed in the Court of Appeals to disqualify a district judge for *bias and prejudice* in a specific action pending in a district court in which the district judge was *then* actually sitting. From the opinion of the Court of Appeals, it would appear that the matter was before the Court *on appeal.* But it was not. The Writ was entered in *original* action number 6238 in that court, whereas the judgment of reversal with the *"suggestion"* that the district judge "step aside" had been entered seventeen months earlier in appeal number 5717.

The *Judicial Council*, to complete the "double-barreled" legal maneuver, also made *findings* of bias and prejudice *without hearing* and issued its *Companion* Writ *sua sponte* "pursuant to the power and authority of the Judicial Council under the Act of June 25, 1948, c. 646, section 332, 62 stat. 902, 28 U.S.C. 332", *not reported,* but see Appendix to Chief Judge Ritter's Petition for Writ of Certiorari or Mandamus, No. 823 Miscellaneous, October Term 1959, supra.

Congress has neither directly nor indirectly authorized authorized Courts of Appeals or Judicial Councils to disqualify district judges for bias and prejudice or for any other reason. It has been very sparing in granting the right and has strictly limited the right to do so to litigants who file an affidavit of *personal* prejudice and comply strictly with other specific requirements of the statute, 28 U.S.C. 144. (The legislative history of the section reveals that Circuit Judges have vigorously opposed amendment of the Act to permit disqualification by the parties of Circuit Judges for bias and prejudice.)

In *Ritter* there was no affidavit filed as required by 28 U.S.C. 144. The party to the action filed an *original* action in the Court of Appeals for a writ disqualifying the trial judge for *bias and prejudice.* Yet the new double-barreled writ entered both by the Court and Council accomplished the impossible by effectively "repealing" Section 144 by the combined use of its "*inherent* powers of appellate jurisdiction", that it seemed to them to constitute a Congressional district courts" granted by Section 332.

The plain Congressional limitation and the clear adjudication thereof by this Court did not raise difficult hurdles for the Court of Appeals and Judicial Council of the Tenth Circuit. They read into the benign provisions of Section 332 a blanket grant of "appellate supervisory *control* of the district courts". Indeed, a grant so clear and explicit, when combined with their self-assumed "*inherent* appellate jurisdiction" it seemed to them constituted a Congressional mandate causing them to "have *no doubt* of our *power* and *inescapable duty* to grant the relief sought whether it be found in the all-writ statute or in the exercise of the *inherent* powers of appellate jurisdiction to effectuate what seems *to us* to be the manifest ends of justice." *Ritter,* 273 F.2d 30, 32 (1959).

*Ritter* was soon followed by *Occidental v. Chandler,* 303 F.2d 55, cert. den. 372 U.S. 915, 9 L.Ed.2d 722, 83 S.Ct. 718 (1963), pet. for reh. den. 373 U.S. 906, 10 L.Ed.2d

201, 83 S.Ct. 1288 (1963) where the court of appeals *sua sponte* in an *original* mandamus action filed in that court where it had no jurisdiction whatever, changed the issues, took evidence for three days, tried the district judge for *fitness* without due process, found extreme *bias and prejudice* and unfitness where none existed, and entered a genuine double-barrelled *defamatory* supervisory writ prohibiting the judge from proceeding further in a large bankruptcy reorganization case upon which he had spent months of time and in which every original creditor and stockholder and the Securities & Exchange Commission opposed the entry of the writ. The court *sua sponte* arbitrarily held it to be an "exceptional" case, which it was not, citing *Ritter* as authority for its action but significantly *omitting* the apparently embarrassing words *"to us"* and replacing them with three stars. The court said:

> "[1] The jurisdiction of this court is questioned on the ground that a ruling on a motion for disqualification made under 28 U.S.C. § 144 is reviewable only on appeal and that the All-Writs Statute, 28 U.S.C. § 1651, does not apply. The facts alleged and proved establish this case as an *exceptional case* in which the preservation of the right to fair and impartial hearing and disposition requires the exercise of our jurisdiction at this time. The question of the disqualification of a trial judge was presented in *United States v. Ritter*, 10 Cir., 273 F.2d 30, 32, and we held that we have the *'power and inescapable duty'* to act and that it makes no difference whether such power is conferred under the All-Writs Statute or under the inherent powers of a United States Court of Appeals 'to effectuate what seems * * * to be the manifest ends of justice.' Application to the United States Supreme Court for relief from our action in the *Ritter* case was denied. *Ritter v. Murrah*, 362 U.S. 946, 80 S.Ct. 873, 4 L.Ed.2d 866."

The *Ritter* double-barrelled procedure was then followed by the court, again sitting *en banc*, immediately resolving

itself into a Judicial Council and shooting the other barrel pursuant to authority claimed to be vested in the Council by Section 332.

In *Occidental* the Circuit Judges went even further in their punitive findings than they did in *Ritter*. They *defamed* the district judge by statements of half-truths which they knew to be false, imputing *dereliction* and *dishonor* as they did in the Council order in the instant action. In *Ritter* findings of "obvious" interest and gross incompetency had been used by the court and Council to castigate and belittle the district judge.

The next use of the double-barreled defamatory punitive writ was in *Texaco v. Chandler*, 354 F.2d 655, C.A. 10, 1965, cert. den. 383 U.S. 936, 15 L.Ed.2d 853, 86 S.Ct. 1066, a *Companion* case to the instant action. The Writ of Prohibition in *Texaco* was issued by the Court of Appeals on the same day that the original Council Order was entered in the instant action, *Texaco* being one of the 163 cases at which the Council order was directed. In *Texaco* the Court cited both *Ritter* and *Occidental* as authority for its action.

Historically, the power first usurped in *Ritter* was snowballed into virtual power of impeachment by the judges of the Court of Appeals when sitting *en banc* in *Texaco* and immediately resolving themselves into a Judicial Council, shooting the *other* barrel in *Texaco* and then, claiming to be acting *only* in their capacity as a Council and shooting only the "administrative" barrel when finding a district judge *unfit* to sit in *any* case from which action they *now* claim there is *no* right of review by this court because the Council is an adminsitrative agency. Thus, except for *Texaco*, the Council Order here is a single-barreled multiple writ directed at the remaining 162 cases.

In *Texaco* the Court of Appeals did not even give the trial judge an opportunity to pass on the motion filed in the *district* court seeking his disqualification. The Court and Council *actually exercised* the trial judge's discretionary

exclusive function to determine whether he should "in his opinion" under Section 455 disqualify himself.

Thus have the judges of the Tenth Court of Appeals and Judicial Council effectively arrogated unto themselves *unlimited* general original jurisdiction over *every case* pending in the *district courts* of six states from the moment they are filed with the district court Clerk. And this has been the Federal law of the six states of the Tenth Circuit since 1959.

The usurpation of this power and jurisdiction may have been suggested or at least encouraged by a strange sentence appearing in *La Buy*, 352 U.S. 249, 1 L.Ed.2d 290, 77 S.Ct. 309 (1957) where it is stated by Mr. Justice Clark in the last paragraph of the opinion that:

> "We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system."

Since it was used as "the entering wedge", the Court may wish to review carefully the decision in the light of the questions raised here.

The extension of the All-Writs Act to cases other than those in which a court has exceeded or refused to exercise its jurisdiction or in which appellate review will be defeated if a writ does not issue is fraught with danger. The temptation for Courts of Appeals to *arbitrarily* find "clear abuse of discretion" and "exceptional circumstances" seems irresistible. Too often writs have been arbitrarily issued under one plausible guise or another when a careful analysis will disclose the writ to be "supervisory" in nature.

It is assumed that neither the Congress nor this Court is aware that their clear enunciations have been thus so openly and arrogantly nullified since to one who was not a district judge in the Tenth Circuit and watched the game from his ringside seat this complete distortion of the judicial process may not actually have been noticeable. Hence the need for the filing of this paper. But the "old timers", those who were privileged to serve several years as *inde-*

*pendent* trial judges of general original jurisdiction before 1948 when the *scheme* gained momentum and new words were surreptitiously slipped into Section 332, know from experience that "supervision" is a bad word and means improper meddling in their cases at the trial level by appellate judges avid for power.

The Circuit Judges now are able to "suggest" specific discretionary decisions to district judges and if the district judges cannot be politely coerced into "cooperating" with those who would "supervise", the new double-barreled writ is available to compel acquiescence and defame them. 362 U.S. 946, 4 L.Ed.2d 866.

In order to get by with such clear usurpation of power it was necessary for the Judges to justify their unlawful acts. They did so by making it appear that the "unseated" judge had an improper interest in the case, by the use of paternal phrases, and by couching findings based on no competent evidence in such flagrant half-truths as to make it appear falsely to the public eye that the district judge was incompetent, derelict or corrupt and that the end justified the means. And they did not hesitate to avail themselves of this unwholesome strategy of character assassination. The trial judge in each instance was gravely discredited by the issuance of a clearly punitive defamatory Writ and Order.

The Circuit Judges of the Tenth Circuit have already cut this shabby pattern and reduced the district judges of the Circuit to the status of subordinate trial examiners. The whole Congressional plan of separate trial and appellate courts has been circumvented and destroyed by usurpation by the Circuit Court and Council of District Court functions thus dangerously concentrating both original and appellate jurisdiction in that one court.

This case furnishes a vehicle in which this court can avail itself of the opportunity to speak and restore Constitutional government in the Tenth Circuit.

It is no more a proper *function* of appellate judges to supervise the *administration* of a trial court that it is for trial judges to supervise the administration of appellate courts. It is their statutory *appellate* function to administer their own courts and review *final* decisions of district courts. It is not their proper function to tamper in any way at the trial stage with the *work* (administration) or discretionary judicial decisions of the trial judges. It is their *limited* function to review only the final orders of trial judges.

Other Circuit Courts now review the size of jury verdicts, set them aside as against the weight of the evidence, substitute their judgment for that of trial courts when findings are based on documentary evidence, try cases *de novo* where the findings of fact are clearly based on conflicting testimony and, not content with this, they also use Extraordinary Writs to control the discretionary acts of District Judges.

No better authority should be needed than the erudite article by *Professor Charles Alan Wright* published in *41 Minnesota Law Review 751 (1957)* entitled *"The Doubtful Omniscience of Appellate Courts."* To his everlasting credit and honor he paints the picture vividly, shows each of the four practices to be clearly unconstitutional, convincingly shows each to be destructive of the judicial system and inimical to the effort being carried on then and now to improve the judicial system. There are appended hereto for the convenience of the Court, thirteen copies of this article and of an equally important and pertinent article by Judge Merrill E. Otis, U.S. District Judge for the Western District of Missouri from 1925 to 1944 on the constitutionality of *"schemes"* to create tribunals to try federal judges, entitled "A Proposed Tribunal: Is It Constitutional?" published in Volume 7 of The University of Kansas City Law Review, page 3.

It is sincerely believed that a careful study of the splendid article by Professor Wright referred to above is

necessary for a complete understanding of just what has happened to our judicial system generally since the writer of this paper became a district judge. To one at the trial level who has seen it at first hand, the havoc wrought is clear and frightening.

The members of this Court occupied with problems seemingly of more general importance could not have been fully aware of the tyrannical usurpation and abuse of power by the judges of the Tenth Circuit at the time certiorari was denied in *Ritter, Occidental* and *Texaco* or the Circuit Judges would at that time have been confined to a lawful exercise of their *statutory* limited appellate jurisdiction. Nor would these cases have been cited as precedents in *Cascade Natural Gas Corporation v. El Paso Natural Gas Company, et al.*, 386 U.S. 129, 17 L.Ed.2d 814, 87 S.Ct. 932 (1967) had this Court been aware of the fact that the trial judges were *not personally or emotionally involved* and had been *falsely* defamed by the Circuit Judges of the Tenth Circuit without jurisdiction or due process hearing.

The effect of the citation of these cases in *Cascade* was devastating. The Court of Appeals of the Tenth Circuit jubilantly considered this as approval of their unconscionable decisions in those cases. A few days after the decision in *Cascade* when the jurisdiction of the Court of Appeals to enter the Writ in *Chandler v. United States* (Burbridge), 389 U.S. 568, 19 L.Ed.2d 777, 88 S.Ct. 691 (1968) was challenged at oral argument, a judge of the Court smugly stated from the bench "We can now do anything we want to do" which is as accurate a statement of the power that Court claims and has for thirteen years arbitrarily exercised as should be needed.

It should now be apparent that the Council Order in the instant case stripping the district judge of all power is not as inimical to the independence of district judges as the threat of the asserted right to *sua sponte* summarily strip a district judge of power in specific cases at any moment in the preliminary stages or actual trial without due process

and to prohibit him from proceeding further by reason of any discretionary order he has entered in the case before or during trial. And in the Tenth Circuit the district judge knows what to expect if he does not agree. He must have in mind at all times that if he fails to follow "suggestions", *oral* or written, he can expect to be ordered to "step aside" and to be castigated, belittled and defamed as well.

It is hoped that this paper will expose the arbitrary usurpation and raw and injudicious exercise of this tyrannical power in the Tenth Circuit which concentrates all judicial power in the Circuit Judges sitting as a Court or as a Council, makes them the final arbiters in private litigation which constitutes most of the judicial business in six states since these cases are so seldom accepted for review by this Court. But it will be necessary to study *Ritter, Occidental* and *Texaco* to see the shocking picture clearly and understand the deep concern of the writer and others who know the facts. When these facts are known it is thought that neither the public, the Congress, nor this Court will tolerate its continued existence.

These are not isolated cases where the Judges of the Court of Appeals of the Tenth Circuit have arbitrarily usurped the discretionary functions of a trial judge. Such punitive and indefensible conduct has now become usual. If this course of injudicious and tyrannical conduct is not longer to be tolerated this Court must act. Both constitutional and statutory safeguards have been obliterated in six states. We now live without due process and without an independent Federal trial judiciary. The foundation of our freedom is gone.

The complete change of *function* of judges wrought by the usurpation of district court power by Courts of Appeals can be understood only if this court sees fit to study the records in *Ritter, Occidental, Texaco* and Professor Wright's article. The action of the Council and Court in each case was drastic, arbitrary, highly punitive, defamatory, unjustified by the facts and not in the interest of justice. The

records in these cases reveal this and the danger lurking in any kind of appellate supervision of trial judges.

To furnish only one flagrant example of trial *de novo* in the Tenth Circuit, the court is invited to read the record and briefs in *Neely v. Houston Oilers*, cert. den. 385 U.S. 840, 17 L.Ed.2d 74, 87 S.Ct. 92 (October 10, 1966), reh. den. 389 U.S. 942, 17 L.Ed.2d 224, 87 S.Ct. 285. In *U.S.D.C.-W.D. Oklahoma v. Lutes*, 371 U.S. 941, 9 L.Ed.2d 275, 83 S.Ct. 320 (1962); same case below, 306 F.2d 948, 308 F.2d 574, reh. den. 371 U.S. 970, 9 L.Ed.2d 540, 83 S.Ct. 550; and *Chandler v. United States (Burbridge)*, 389 U.S. 568, 19 L.Ed.2d 777, 88 S.Ct. 691 (1968). Mandamus issued below *by minute order only*, writs were arbitrarily issued in specific cases without jurisdiction.

In *Lutes* the Court of Appeals substituted its judgment for the discretionary order of the district judge staying temporarily the trial awaiting an *early* decision by the Supreme Court of Okoahoma on an important question of substantive oil and gas law not theretofore determined by the State Court. It was later determined by the Oklahoma Supreme Court contrary to an earlier circuit court ruling, *Rogers v. Westhoma*, 291 F.2d 726 (see dissent by Judge Bratton).

In *Neely* the Court of Appeals tried the case *de novo* and set aside findings of fact based on conflicting oral testimony, made its own findings directly contrary to the admissions in open court of the appellant, and in the opinion reversing the case snidely suggested that the trial judge was "irrational".

*Neely* and *Burbridge* were decided since the pendency of the instant action; *Lutes* prior thereto, but the records and briefs would make highly interesting and profitable reading for any member of the court who thinks that the great principles involved in this case justify finding out just what has been going on out on the frontier while this court has been so busy it could not review by certiorari these cases that appeared to affect no one but the parties involved.

The national effort to preserve our institutions is no more important in any area than the restoration of respect for the Constitution and laws of this country. This court should curb the Circuit Judges who have "legislated" themselves virtually *limitless* power to enforce their whims, brazenly thwarting the teaching of this Court and Congressional limitations of their jurisdiction.

In *Ritter, Occidental, Texaco* and the instant case it should not be overlooked that there were very serious violations of legal and judicial ethics, and also a grave *moral* issue–false character assassination.

The Justices of the Supreme Court, the Judges of the Courts of Appeals and the District Courts are all Constitutional judges serving "during good behavior" with the *sole* power to shorten their life tenure vested in the Congress. Courts of Appeals and District Courts are "inferior" courts with only such jurisdiction as is *specifically* granted to them by the Congress.

The United States Courts of Appeals, except in the four specific instances involving certain interlocutory orders set out in 28 U.S.C. 1291, "have jurisdiction of *appeals* from all *final* decisions of the district courts of the United States * * *" 28 U.S.C. 1291. This is the full extent of the jurisdiction of the Courts of Appeals insofar as their *functions* pertain to the activities of district courts and judges.

Some 400 district judges sit alone, each judge constituting a trial court of original jurisdiction whose statutory *function* is to try and determine controversies, to hear evidence, find the facts, apply the law and enter final judgments.

Congress has never granted to the Supreme Court jurisdiction to supervise the "inferior" courts, nor has it granted to the Courts of Appeals jurisdiction to supervise the District Courts. Courts of Appeals and District Courts have separate and distinct, entirely different, *functions*. Each is

supreme in its own sphere. The functions do not and cannot overlap at any point without completely shattering the dual system of courts of original and review jurisdiction. Intervention by the Court of review in any manner at a point prior to final judgment puts the cart before the horse, and not only frustrates the system but destroys it.

Nor have Courts of Appeals power to *increase* their jurisdiction by claiming "inherent" power to do so. "Inherent" power comes into play only when clear jurisdiction over the subject matter is already present, and then for the sole purpose of implementing an already vested jurisdiction. There is no such judicial vehicle as "inherent power" to create or enlarge jurisdiction. That is tyranny!

The Constitution imposes exclusively on the Congress the power and duty to police the judiciary. This is one of the cardinal checks and balances and is a power and duty which the Congress cannot constitutionally delegate to any other person or Governmental body. It naturally follows that the Congress cannot delegate this police power over the judiciary to *the judiciary itself* and specifically and especially cannot constitutionally delegate it to any judge or court of the judiciary. To do so would constitute abdicating its constitutional duty to exercise the power itself which duty is necessarily implied from the exclusive grant of power.

Every individual judge of the judiciary, no matter on what court he sits, is himself subject to the congressional power of impeachment. He, himself, has not the power, whether designated judicial or administrative, to inquire into the fitness of any other judge, because that power and duty to sit as a court and try the fitness of any and every member of the judiciary is, by the Constitution, exclusively and solely vested in the United States Senate, sitting as a *Court.* The Congress cannot constitutionally *permit* the judiciary to police itself nor can it side-step its own duty to do so.

By the same token the Congress cannot constitutionally permit any *part* of the judiciary to exercise police power over any other part, any court or body composed in whole or in part of judges, or any judge to exercise police power over any other court or judge.

Nor can any court, body of judges, or any judge legally, constitutionally or *ethically* seek, accept or exercise this exclusive congressional function.

To delegate the power or any part of it to any judge or court of the judiciary, whether designated a judicial or administrative agency, under guide of the power to supervise in any way, assist in "housekeeping" or "housecleaning" or inquire into the fitness of any member of the judiciary, would be equally unconstitutional for the additional reason that such a delegation of power, even if reciprocal, would constitute class legislation, violative of the equal protection concept.

And how would the judges who espouse the supervision of district judges enjoy being supervised by district judges if the provisions for supervision were made reciprocal? With the shoe on their foot, they would at once see how laughable is the very thought that any judge *can* be supervised. In seeking power for themselves they have not sought reciprocity and have objected to district judges sitting on Judicial Councils on the theory that there should be a "chain-of-command", a difference of importance status between circuit and district judges. This paternal attitude of some Circuit Judges apparently blinds them to the fact that there might actually at this moment be an active circuit judge who is lazy, senile, arbitrary, mentally incompetent, alcoholic, emotionally unstable, too ambitious, tyrannical or even corrupt and that they themselves might ba a judge who should "step-aside".

Of course Circuit Judges may *properly* assume that it is one of the primary duties of a circuit judge to supervise *himself*, but apparently they have never thought of that nor *properly* assumed that it is not only the duty but the *right*

of every district judge to supervise himself. This is the kind of self-supervision which is implicit in the wholesome and rational constitutional concept of an entirely independent judiciary: each judge answerable to no man, subject only to the limited impeachment power of the Congress and the criminal laws of the land. 18 U.S.C. 201.

No judge is properly a judge of the qualifications of his associates. He is exclusively a judge of legal controversies. His only police power over any judge is over himself. When his critical judicial eye looks other than inward it is off the ball and there is grave danger that he is neglecting his official duties. It is obvious that he is neglecting to police his own house where his most precious treasure is stored.

The framers of the Constitution knew that complete judicial independence was vital; that the kind of judges they envisioned *could* not and *would* not be supervised; that any sort of supervision would be evil; that it would destroy the very concept of independence; and that supervision would not be needed. They circumscribed it very, very carefully and effectively prohibited it by limiting it, in effect, to corruption in office.

## CONCLUSION

The following statements are made as constituting the hopefully dispassionate thoughts of a trial judge with reference to the questions which seemed to interest the Court at oral argument.

If a Judicial Council is an administrative agency vested by the Congress with any supervisory power over judges, assuming that the Congress can constitutionally delegate any such power, it is an agency of the Legislative Branch, not the Judicial Branch, and would be subject to the Administrative Procedure Act which provides for appeal and review. *5 U.S.C. 701 et seq.*

The Congress has not vested any supervisory *power* over judges either in the Judicial *Conference* of the United

States nor the Judicial *Councils*. It could not constitutionally do so. Very carefully has the power to enforce been omitted from the Acts creating these bodies. They have only the "power" to "*suggest*", which has been used as a sword of Damocles over timid judges as a form of coercive "persuasion".

In the instant case the Council "cut and ran" when the district judge ignored its invalid Order and continued to exercise his judicial power. If the Council had thought it had the power to enforce its order it would unquestionably have done so. And it should be noted as significant that although the Act creating the Judicial *Conference* of the United States does not intimate that it has power (it has only duties), that the Report on the Powers and Responsibilities of the Judicial Councils (H. Doc. No. 201, 87th Cong., 1st Sess. (1961)) attached by Professor Wright to his brief, shows that the Judicial Conference of the United States expresses the gratuitous opinion that supervisory power is vested in Judicial Councils. The very act of having the Report promulgated and approving it constitutes an attempt to bolster the power unlawfully claimed by Judicial Councils by expressing an uncalled-for judicial opinion encouraging the usurpation of power by Judicial Councils. No finger can point to a congressional grant of such power. This is an attempt to exercise unauthorized power by clever use of its prestige.

There is untold evil in the mistaken idea that supervision of federal judges is desirable or at all possible. The havoc that has already been wrought upon the orderly operation of the judicial system by the attempted usurpation of such power by Judicial Councils is great.

The creation of Judicial Councils of the circuits, 28 U.S.C. 332, was proposed and relentlessly promoted by appellate judges. The legislative history discloses that they did not originally seek supervisory power over district judges. They advised Congress that Section 332 did not need "teeth", power to enforce; that their suggestions

(directions) would be sufficient for the purpose expressed in the Act—"in the interest of uniformity and expedition of business", "to the end that the work of the district courts shall be effectively and expeditiously transacted". They thought this would be a sufficient sword of Damocles to hold over the heads of district judges. They were also of the opinion that power to enforce would make the Act unconstitutional and would arouse the indignant opposition of district judges.

But a few circuit judges even then wanted Section 332 so worded that it could be used as an "inducement" to obtain compliance by district judges with their suggestions and hence the word "directions" in the 1939 Act instead of "suggestions" as used in the Act creating the Judicial *Conference* of the United States, now 28 U.S.C. 331, with "orders" stealthily substituted for "directions" in 1948.

There were many in 1939 who thought the creation of Judicial Councils, Section 332, unnecessary and a duplication of the function of the Judicial *Conferences* of the circuits. It should be noted that Section 331 creating the Judicial Conference of the United States composed of the Chief Justice and the Chief Judges of the Circuits provides:

> 'The Conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary, and shall submit *suggestions* to the various courts, in the interest of uniformity and expedition of business."

and that Section 333 creating the Judicial *Conferences* of the Circuits composed of all of the circuit and district judges of the circuit provides:

> "For the purpose of considering the business of the courts and *advising* means of improving the administration of justice within such circuit."

These were both entirely wholesome provisions. There was no suggestion of coercion or supervision in either

Section 331 or 333 and they fully accomplished the stated purpose of judicial councils which was:

> "To the end that the word of the district courts shall be effectively and expeditiously transacted * * * It shall be the duty of the district judges promptly to carry out the *directions* of the council as to *the administration* of the business of the courts."

It should be apparent that when created the Judicial Conference of the United States and the Judicial *Conferences* of the Circuits were benign and useful tools devised for the purpose of submitting "*suggestions* to the various courts, in the interest of uniformity and expedition of business" (Section 331) and "for the purpose of considering the business of the courts and *advising* means of improving the administration of justice within such circuit" (Section 333).

But Section 332 creating Judicial Councils, although fortified with no enforcement power, originally contained two noxious words "shall" and "duty" devised by chief circuit judges who then (as now in actuality they control the Judicial Conference of the United States) constituted the Conference of Senior Circuit Judges.

That the sword (Judicial Councils) was then intended to be used only as a *gentle* threat does not lessen the nature of the tactic which is unworthy of attempted use by Circuit Judges to enforce their will upon a district judge who has the legal *right* and moral *duty* to make his own discretionary decisions in the *administration* of his own court as he does to make his own discretionary decisions in the entry of judicial orders.

Both Sections 331 and 332, Title 28 U.S.C., are unconstitutional if construed to grant to the Judicial Conference of the United States or to Judicial Councils any power whatever to supervise *either* the *judicial* or *administrative* acts of a district judge by the entry of *any* kind of an *enforceable* order affecting *the administration* of the busi-

ness of a district court or *any* judicial function of a district judge.

The statutory provisions of Section 137, Title 28 U.S.C., were not activated in the instant case by a bona fide disagreement of the district judges and a certification of the dispute by a district judge to the Judicial Council for resolution. Even had these statutory requirements been met it would have given the Council no power to enter any *valid* and enforceable order affecting either pending or new cases of a district judge. This section is unconstitutional to the extent that it purports to grant to circuit judges power to interfere in the *administrative* affairs of a district court and enter an enforceable order regarding the division of new cases, even though by the terms of the statute the power is not activated except upon request of a district judge in the event of a disagreement. This would constitute an *original* justiciable *controversy* requiring due process and trial and would not be *appellate* in nature. A Judicial Council is not vested with either original or appellate *judicial* power to adjudicate the controversy. The same is true with reference to 28 U.S.C. 372(b) hearing and 11 U.S.C. 62(b) removal of Bankruptcy Referees for cause which latter section conflicts with the power granted district judges by 28 U.S.C. 756. All other sections purporting to give Judicial Councils any power whatever are also unconstitutional.

It is not a proper *function* of a judge or judges of an appellate court to meddle in the discretionary administrative affairs of the judges of the trial court or to "help" the trial judge try the cases which it is their function to review. To do so impairs the independence of that judge or court and Congress has never granted any such power, if it could.

Although Congress has not intended to abridge the independence of District Judges by granting to a judge or to judges of appellate courts the right to supervise in any manner in the administrative affairs of a trial court of original jurisdiction it would not seem to have the constitutional power to do so. For example, Sections 332 and 137

of Title 28 U.S.C., if so construed, constitute *class legislation.* All "during good behavior" judges are not affected equally nor is the statute reciprocal. Some judges are given greater burdens and some judges' rights are restricted in violation of the equal protection clause of the Constitution.

The insidiousness of these sections has been obscured by the seemingly wholesome concept that the judiciary should police itself. But the concept has been misconstrued. While it is true that the judiciary *should* police itself and keep its own house clean, this does not mean, as has been mistakenly supposed, that one judge or set of judges should police another judge or another set of judges. The concept that the judiciary should keep its own house clean can only mean that *each* one of the 500 Federal Judges should keep his own house clean, *not* the house of his judicial brother. It means that he should tend to his own business with great care. If he does this well he will find it a full-time job. A judge's conscience is strictly a personal matter and cannot be tampered with (supervised) by another judge or set of judges. If he is a trial judge he should not be tampered with by judges of a court which reviews his decisions. He should be *especially* protected from interference in the performance of his duties by appellate judges.

This applies to the administrative work of his court as well as to the trial and decision of cases. Judicial independence means and requires not only freedom from control by sources outside the judiciary but *especially* means and *requires* freedom from control or supervision by sources *within* the judiciary. A judge whose administrative decisions can be supervised is not an independent judge. The administrative duties of a trial judge are a *vital* and integral part of his function in the judicial process and *directly* affect the resulting end product, his final judicial decisions.

Interference by an appellate court at the trial level reduces the judge to a mere trial examiner and does away with the necessity for the appellate court. If appellate judges are permitted to *step down* to the trial level during

the trial process and exercise the discretionary functions of trial judges, the appellate function and purpose is at least seriously impaired, and the independence of the trial judge is completely destroyed.

The right to discredit and abuse a trial judge has now become settled law in the Tenth Circuit. The picture is very clear. The tyranny exhibited here strikes fear to the hearts of all trial judges, especially those who know they will refuse to be intimidated by character assassination. That such usurpation of power is not new in the world, brings to mind the thought "What meat does this our Caesar eat that he has grown so strong?"

It is too late to nip the evil in the bud. Great damage has already resulted. But this Court by its decision in this case has the power to restore the American birthright to the citizens of six states.

Judge Magruder of the First Circuit stated:

> "Contrary to the view which seems to have been occasionally taken, or at least *sub silentio* assumed, in other courts of appeals, we do not think that 28 U.S.C. § 1651 [the All-Writs Act] grants us a general roving commission to supervise the administration of justice in the federal district courts within our circuit . . ." *In re MacNeil Bros. Co.*, 259 F.2d 386, 387.

This is in direct contrast to the pronouncement of Chief Judge Murrah made and assented to by the other judges in *Occidental:*

> "We are not just sitting here to decide the legal sufficiency of an affidavit to d squalify a trial judge. We are sitting here in the exercise of our supervisory powers as a court . . ." (Respondent's Brief, p. 11)

Three days of testimony were taken in *Occidental.* Certainly these words of the Chief Judge of that court are at odds with earlier utterances of this Court, to wit:

> "e.g., *Whitney v. Dick,* 202 U.S. 132, 137 ('It will be borne in mind that the circuit court of appeals,

> which is a court created by statute . . . is not in terms endowed with any original jurisdiction. It is only a court of appeal'); *Ex parte Bollman*, 4 Cranch 75, 93 ('. . . [C]ourts which originate in the common law possess a jurisdiction which must be regulated by their common law . . . but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.'); *Kentucky v. Powers*, 201 U.S. 1, 24 ('We say . . . the subordinate judicial tribunals of the United States can exercise only such jurisdiction, civil and crimi[illegible]s may be authorized by acts of Congress.')"

Serious and recurrent problems of judicial policy are graphically raised and ripe for adjudication by this court. The judges of the Court of Appeals and Judicial Council of the Tenth Circuit have "legislated" themselves limitless jurisdiction to do "anything we want to do" in violation of the division of powers concept of the Constitution and all American principles of judicial propriety. By their defense here they ask this Court to side-step decision of the compelling issues and thereby indirectly approve their tyrannical usurpation of power.

Respondent asks leave to file this further expression in behalf of the maintenance of the great principles of the *rule of law* upon which our government is based. To legalize the power exercised would require Constitutional amendment and legislation by Congress.

To supervise or defame another judge is not a proper nor acceptable judicial function. If a judge is corrupt, impeachment and the criminal laws are available. 18 U.S.C. 201. If he is not corrupt his fitness in other respects is not a justiciable issue under our Constitution.

Neither the Judicial Conference of the United States nor the Judicial Councils of the Circuits can legally or constitutionally supervise any judge or Court whether it is called "housekeeping" or "housecleaning."

Power is not safe in the hands of those who would abuse it. Judicial abuse of power is *defiance* of law in its most malignant form. The shame and indignity of personal injustice is as nothing compared to the terrible blow to public respect for the judiciary occasioned by the intemperate use of the Extraordinary Writs referred to which substitute the will of men who take the law into their own hands for the rule of law.

The fearless incorruptible United States District Judges of the past, by reason of their independence, were able to mete out justice at the trial leve. They were the glory of America. The decision in this case can restore the rule of law.

Respectfully submitted,

STEPHEN S. CHANDLER,
United States District Judge,
Petitioner, *Pro Se*

No. 2 Misc.

JUN 24 1970
JOHN F. DAVIS, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

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STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA, Petitioner,

v.

JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES, Respondent.

---

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS

---

## PETITION FOR REHEARING

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## PETITION FOR REHEARING

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The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the Motion for Leave to File Petition for Writ of Prohibition and/or Mandamus, entered on June 1, 1970, and (2) granting the Motion. As grounds for this petition, petitioner states the following:

1. *The Court's June 1, 1970 Opinion is not directed to the issues raised in the motion for leave to file.*

The petition before the Court, attached to petitioner's motion for leave to file, challenges an order that issued from the Judicial Council of the Tenth Circuit, respondent

herein, on December 13, 1965. While the Judicial Council on February 4, 1966 superseded the challenged order of December 13, 1965 and later issued additional orders modifying its February 4, 1966 order, the original order of December 13, 1965 is the only order challenged in the Motion for Leave to File and the only order before the Court for review.

The record in this proceeding is voluminous. A great portion of it is dedicated to an interpretation of the various actions of the Judicial Council subsequent to its entry of the original order of December 13, 1965 and subsequent to the filing of this action. While petitioner may have repeatedly asserted that the Judicial Council was continuing to act in violation of his rights and inconsistent with law, the significance of all filings in this proceeding subsequent to petitioner's original motion was the establishment of the melancholy fact that the subsequent actions of the Judicial Council were wholly an attempt to deceive the Court by glossing over its initial conduct with actions that might have some better basis in law or fact. Unfortunately, the opinion of the Court in denying petitioner's motion and the Concurring Opinion of Mr. Justice Harlan both placed emphasis upon the superseding of the challenged order of the Judicial Council and the subsequent actions of the Judicial Council as if these actions somehow altered the nature of this proceeding. It is submitted that none of the subsequent actions of the Judicial Council have any bearing on this case other than the light they might shed upon any ambiguities contained in the initial reasons stated by the Judicial Council as justifying the issuance of its Order of December 13, 1965. Since these subsequent actions clearly show that the Judicial Council twice altered its announced grounds for taking the original action against the petitioner, it is our contention that the record itself reveals, through the Judicial Council's inconsistencies, that the subsequent actions of the Judicial Council are to be accorded no weight in this proceeding.

The second order of the Judicial Council, that of February 4, 1966, and subsequent orders and actions have not in any way impaired the reviewability of the motion for leave to file, which challenges the original December 13, 1965 order of the Judicial Council, unless the Court is overruling a well established rule of law concerning mootness of issues, which rule was only recently unanimously reaffirmed by this Court on November 25, 1968 in *United States v. Concentrated,* 393 U.S. 199, in which case the Court stated:

> "The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the Courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.' *United States v. W. T. Grant Co.,* 345 U.S. 629."

Petitioner assumes the Court did not presume to overrule this well established rule of law. Yet, the Opinion of the Court, in denying petitioner's motion, stated:

> "In essence petitioner challenges *all orders* of the Judicial Council relating to assignment of cases in the Western District of Oklahoma as fixing conditions on the exercise of his constitutional powers as a judge." (emphasis added).

2. *The Opinion of the Court is based upon false assumptions of fact.*

As stated above, the Opinion of the Court and the Concurring Opinion of Mr. Justice Harlan place great emphasis upon the actions of the Judicial Council subsequent to its initial order and upon actions of the district judges of petitioner's court in the assignment of cases. Yet, unless the Court is blind to the shotgun wedding nature of petitioner's participation in these later events and chooses to conclude that he willingly acquiesced in these subsequent actions, the reliance by the Court upon these subsequent events amounts to its reliance upon facts foreign to the issues raised by petitioner's motion for leave to file. The Court should return its attention to a consideration of the facts that were actually before the Court.

The original order of the Judicial Council must be accepted at face value. The Court should carefully consider the announced reasons stated by the Judicial Council in such order as justifying its action in stripping the petitioner of all his judicial powers. *There is no mention in such order reciting a heavy caseload that petitioner was unable or unwilling to bear.* Yet, the later fabrication by the Judicial Council of this theory is the escape hole through which it slips. If this was the basis for the original December 13, 1965 order, why was it not so stated at that time?

Only a casual reading of the record in this proceeding reveals that the Judicial Council successively adopted three different positions to justify its action against petitioner:

(1) *Position No. One: the challenged order of December 13, 1965.* The Judicial Council referred to the "attitude and conduct of Judge Chandler" as they had particular regard to the business of his court. Reference was made to the fact that during the past four years Judge Chandler had been a party in both civil and criminal litigation and that one civil case was still pending. Reference was made to the fact that two proceedings had been brought in the U. S. Court of Appeals for the Tenth Circuit to disqualify him from handling specific litigation and that in one instance he was ordered to proceed no further and that the other proceeding was still pending. Finally, a statement was made that

> "from a review of the entire situation pertaining to Judge Chandler the Judicial Council finds that Judge Chandler is presently unable, or unwilling, to discharge the official duties of his office."

This order against Judge Chandler was issued in a manner shockingly inconsistent with the principles of due process of law.

(2) *Position No. Two: the January 13, 1966 Memorandum For The Respondent In Opposition To The Application For Stay.* This memorandum clearly departs from the challenged December 13, 1965 order of the Judicial Coun-

cil in that it advises the Court, through rather strong innuendo, that the true reason the Judicial Council had acted against Petitioner was that he was either insane or corrupt or some other horrible situation existed. The statement is made by Solicitor General Thurgood Marshall that he had personally examined materials in the files of the Judicial Council and of the Administrative Office of the United States Courts in Washington and that

> "without intimating any view of the ultimate merits, he deems it appropriate to state to the Court his conviction that the matter is one which warrants the most careful examination."

Solicitor General Marshall also stated that

> "Public confidence in the federal judiciary would inevitably be impaired if Judge Chandler were to preside over the District Court of the Western District while the question of his present unfitness to serve in that capacity is under consideration."

*(3) Position No. Three: the March 17, 1966 Supplemental Memorandum For Respondent.* In this document, the Judicial Council again changed its position and stated that it had been suppressing petitioner's judicial powers all along only in order to help him clean up a crowded docket, action superficially more compatible with the provisions of 28 U.S.C. 137 than with those of 28 U.S.C. 332.

Petitioner has always maintained that the Supplemental Memorandum for Respondent was crammed with poppycock and clearly revealed that the Judicial Council was not candidly dealing with the Court. Should any party before this Court, even a Judicial Council, that changes its position three times be accorded the general presumption of credibility due litigants?

The issue petitioner has been trying to present to the Court for its consideration for over four years is the legality of the initial December 13, 1965 order. Such issue has never been mooted. The announced reasons in the initial order for the action taken against petitioner are the only

reasons properly before this Court. Such order should be taken at face value due to the demonstrated lack of credibility of the Judicial Council in explaining its actions and due also to the fact that orders signed by circuit judges are supposedly well drafted and should be taken at face value anyway. The Court, in its Opinion and Concurring Opinion, did not address itself to the facts involved in this proceeding, which facts are wholly contained in the Petition for Writ and have never been challenged or refuted by the Judicial Council.

3. *The jurisdiction question.* Petitioner notes with regret that the Court approaches the jurisdiction question raised in this proceeding but turns away and alludes to the difficulty of the question as one of the reasons the Court should decline, in its discretion, to grant the extraordinary remedy of mandamus or prohibition. Petitioner appreciates the more careful consideration given this question by Mr. Justice Harlan in his Concurring Opinion and hopes the reasons set forth above will persuade him and others in the majority to recommend a rehearing of this proceeding due to the lack of legal significance of the Judicial Council's actions taken subsequent to the order of December 13, 1965.

There was no question of a lazy or inefficient judge with a large backlog of cases, as the Council tried to make it appear by its subsequent issuance of other Orders so suggesting.

The district judge had no backlog of cases. His docket was current. His cases were proceeding to final judgment with dispatch as they had been for the preceding 22 years.

The records of the court, available to all, show that the district judge disposed of an average of 201 Civil cases each fiscal year from his appointment in 1943 to June 30, 1966, six months after the Writ of Prohibition was entered, far more than any of the other judges of the court during any part of the 22 years. In addition he handled his proportionate share of the criminal cases and all of the time-consuming Bankruptcy Reorganization cases during the

years 1956 to 1965. Judge Chandler was Chief Judge during this same ten year period and also handled the administrative matters of the court, which is also quite time-consuming.

During the five years ending June 30, 1966, the court records show that, with only two judges sitting in fiscal year 1961, Judge Rizley disposed of 208 Civil and 112 Criminal cases and that Judge Chandler disposed of 219 Civil and 134 Criminal cases; that during the ensuing four years ending June 30, 1966 the average of cases disposed of was -

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|---|---|---|
| Judge Chandler | 156 Civil | 87 Criminal |
| Judge Rizley | 102 Civil | 51 Criminal |
| Judge Bohanon | 80 Civil | 115 Criminal |
| Judge Daugherty | 86 Civil | 98 Criminal |

(Judges Bohanon and Daugherty, who are roving judges with headquarters in Oklahoma City, handled business in two other districts also. Photostatic copies of the complete statistics as reflected by the official records of the Court Clerk on file with the House Judiciary Committee are attached hereto. If the Administrative Office of the United States Courts had kept translatable statistics, its records would have also reflected these facts.)

The foregoing statistics show conclusively the lack of candor of the Judicial Council in its subsequent efforts to promote a "heavy caseload" justification for its December 13, 1965 order ("Judge Chandler is presently unable, or unwilling, to discharge efficiently the duties of his office;") and for its February 4, 1966 order, where the Council states on page 4 of the order:

> "2. The Council *is informed of* the present and past administration of the business within the Western District of Oklahoma as revealed *by the files and records of the Clerk of the Western District*, the reports and analysis of the same by the Office of the Administrator of the United States Courts, and by this Council's continuing review of the operations of that Court." (emphasis added).

Yet the Court, in its denial Opinion, dwelt upon the later orders entered by the Council, orders concocted in an effort to make it seem (contrary to the facts) that petitioner had too large a backlog of cases and shouldn't be assigned any more cases until his backlog was disposed of. This was a reliance upon matters not only foreign to this proceeding but matters deliberately contrived to mislead the Court.

In connection with the foregoing, the Court should be reminded that the Council *conceded* that its February 4, 1966 and July 12, 1967 orders "restoring" the district judge's powers *did not moot the question of the legality of the original Order* of December 13, 1965. *United States v. Concentrated,* 393 U.S. 199.

No wonder the Judicial Council did not justify, in its initial order, the stripping of Judge Chandler's powers for inattendance to judicial duties. Petitioner urges Mr. Justice Harlan and the others in the majority to disregard the caseload smokescreen laid down by the Judicial Council, to adopt Solicitor General Griswold's and Mr. Justice Harlan's handling of the jurisdiction question and grant a rehearing on the issues involved in this proceeding.

The Supreme Court had potential appellate jurisdiction by virtue of Sec. 1651 (a) of the Judicial Code over each of the 150 cases in which Judge Chandler was sitting but refused to exercise it in violation of the time-honored precept expressed by Chief Justice Marshall in 1821 in *Cohens v. Virginia,* 19 U.S. 264, 404, where he said

> "It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. * * * With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be *treason* to the constitution." [italics ours]

If the present judgment stands all United States District Judges serve at the whim and caprice of Judicial Councils, the Separation of Powers Concept is destroyed, the Constitution scrapped.

## CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ attached to his motion for leave to file, petitioner prays that this Court grant rehearing of theorder of denial, vacate that order, grant the petition and review the December 13, 1965 order of the Judicial Council and issue the Writ sought by petitioner for so many years.

Respectfully submitted,

Thomas J. Kenan
*Counsel for Petitioner*

June 24, 1970

Certificate of Counsel

As counsel for petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(1).

Thomas J. Kenan
*Counsel for Petitioner*

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 2, Misc.—OCTOBER TERM, 1969

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| Stephen S. Chandler, United States District Judge for the Western District of Oklahoma, Petitioner, *v.* Judicial Council of the Tenth Circuit of the United States. | On Motion for Leave to File Petition for Writ of Prohibition and/or Mandamus. |

[June 1, 1970]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Petitioner, a United States District Judge, filed motion for leave to file a petition for a writ of mandamus or alternatively a writ of prohibition addressed to the Judicial Council of the Tenth Circuit. His petition seeks resolution of questions of first impression concerning, *inter alia*, the scope and constitutionality of the powers of the Judicial Councils under 28 U. S. C. §§ 137 and 332.[1] The

[1] 28 U. S. C. § 137, 62 Stat. 897.

"137. Division of business among district judges

"The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.

"The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.

"If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

"332. Judicial Councils

"The chief judge of each circuit shall call, at least twice in each

Judicial Council of each federal circuit is, under the present statute, composed of the active circuit judges of the circuit. Petitioner has asked this Court to issue an order under the All Writs Act [2] telling the Council to "cease acting [in] violation of its powers and in violation of Judge Chandler's rights as a federal judge and an American citizen." The background facts are of some importance.

1

On December 13, 1965, the Judicial Council of the Tenth Circuit convened in special session [3] and adopted an order which reflected a long history of controversy between petitioner and the Council concerning the conduct of the work of the District Court assigned to petitioner. The Order of December 13 purported to issue

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year and at such places as he may designate, a council of the circuit judges for the circuit, in regular active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall attend all sessions of the council.

"The council shall be known as the Judicial Council of the circuit.

"The chief judge shall submit to the council the quarterly reports of the Director of the Administrative Office of the United States Courts. The council shall take such action thereon as may be necessary.

"Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."

[2] 28 U. S. C. § 1651, 62 Stat. 944, as amended, 63 Stat. 102.

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

[3] Chief Judge Alfred P. Murrah took no part in the proceedings.

under the authority of 28 U. S. C. § 332, *supra*, n. 1, and recited that during

> ". . . the past four years the Judicial Council at many meetings has discussed and considered the business of the United States District Court for the Western District of Oklahoma and has done so with particular regard to the effect thereon of the attitude and conduct of Judge Chandler who, as the Chief Judge of that District, is primarily responsible for the administration of such business. . . ."

The Order noted that during that period petitioner had been a party defendant in both civil and criminal litigation, as well as the subject of two applications to disqualify him in litigation in which on challenge petitioner had refused to disqualify himself.[4] The Order continued with a finding that

> ". . . Judge Chandler is presently unable, or unwilling, to discharge efficiently the duties of his office; that a change must be made in the division of business and the assignment of cases in the Western District of Oklahoma; and that the effective and expeditious administration of the business of

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[4] The civil suit was an action brought by one O'Bryan charging petitioner with malicious prosecution; the complaint was dismissed by the District Court, affirmed *en banc* 352 F. 2d 987 (C. A. 10th Cir.), cert. denied, 384 U. S. 926 (1966). The criminal indictment charging conspiracy to cheat and defraud the State of Oklahoma was quashed.

In both cases seeking disqualification of petitioner, including one decided after the signing of the Order here challenged, writs of mandamus issued against petitioner. See *Occidental Petroleum Corp.* v. *Chandler*, 303 F. 2d 55 (C. A. 10th Cir.) (*en banc*), cert. denied, 372 U. S. 915 (1963); and *Texaco, Inc.* v. *Chandler*, 354 F. 2d 655 (C. A. 10th Cir.) (*en banc*), cert. denied, 383 U. S. 936 (1966).

> the United States District Court for the Western District of Oklahoma requires the orders herein made."

Expressly invoking the powers of the Judicial Council under 28 U. S. C. § 332, *supra*, n. 1, the Order directed that

> ". . . until the further order of the Judicial Council, the Honorable Stephen S. Chandler shall take no action whatsoever in any case or proceeding now or hereafter pending in the United States District Court for the Western District of Oklahoma; that all cases and proceedings now assigned to or pending before him shall be reassigned to and among the other judges of said court; and that until the further order of the Judicial Council no cases or proceedings filed or instituted in the United States District Court for the Western District of Oklahoma shall be assigned to him for any action whatsoever.
>
> "It is further ORDERED that in the event the active judges of the United States District Court for the Western District of Oklahoma, including Judge Chandler, cannot agree among themselves upon the division of business and assignment of cases made necessary by this order, the Judicial Council, upon such disagreement being brought to its attention, will act under 28 U. S. C. § 137 and make such division and assignment as it deems proper."

Copies of the above Order were filed in the Court of Appeals for the Tenth Circuit and in the United States District Court for the Western District of Oklahoma on December 27 and 28, respectively. Another copy was served on Judge Chandler by a U. S. Marshal.

On January 6, 1966, as previously noted, Judge Chandler filed with this Court his motion for leave to file a petition for a writ of mandamus and/or prohibition

directed to the Judicial Council. He also sought a stay of its Order. The Solicitor General, appearing on behalf of the Judicial Council, asked this Court to deny the stay application on the Council's representation that the Order of December 13 was only temporary pending prompt further inquiry into Judge Chandler's administration of the business of his court. The stay was denied on January 21, 1966, on the ground that the Order was "entirely interlocutory in character pending prompt further proceedings . . . and that at such proceedings Judge Chandler will be permitted to appear before the Council, with counsel . . . ." 382 U. S. 1003.

On January 24, 1966, Judge Chandler addressed a letter to his fellow district judges indicating that he objected to the removal and reassignment of cases previously assigned and pending before him on December 28, 1965, but that he was *not* in disagreement with them as to the assignment of all new cases to judges other than himself. Judge Chandler asserted continuing judicial authority, however, over the cases pending before him as of December 28. The following day the judges of the Western District of Oklahoma advised the Judicial Council that all judges of that District had agreed on the division of new business filed in that court, but that they could not agree on the assignment to other judges of cases then pending before Judge Chandler.

On January 27, 1966, the Judicial Council again convened in special session and ordered a hearing on February 10, 1966, in Oklahoma City at which Judge Chandler was invited to appear, with counsel if he desired. However, by February 4, when the Council met again, it had been advised that no judge of the Western District, including Judge Chandler, desired to be heard pursuant to the order for hearing. Accordingly, no hearing took place.

At this same meeting on February 4, 1966, the Council concluded that there was a disagreement among the District Judges of the Western District as to the division of business; it reached this conclusion on the basis of the disagreement between Judge Chandler and the other District Judges as to the reassignment of cases previously assigned to Judge Chandler as of December 28, 1965. The Council accordingly, acting under 28 U. S. C. §§ 137 and 332, entered an order authorizing Judge Chandler to continue to sit on cases filed and assigned to him prior to December 28, 1965; the Order assigned to the other judges of the Western District cases filed after that date. This Order of February 4 recited further that

> "4. The division of business and assignment of cases made herein may be amended or modified by written order assigned by all active judges of the Western District of Oklahoma, provided that nothing contained herein shall be construed as preventing Judge Chandler from surrendering any pending cases for re-assignment to another active judge or to prevent transfer between judges to whom new business is assigned puruant to this order.
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> "5. This order supersedes the orders of the Council entered on December 13, 1965, and on January 27, 1966, entitled 'In the Matter of the Honorable Stephen S. Chandler, United States District Judge for the Western District of Oklahoma' and shall remain in effect until the further order of the Council."

On February 9, 1966, the Solicitor General filed a Memorandum on behalf of the Council suggesting that in light of the above developments, namely the confirmation of Judge Chandler's authority to dispose of the case load then before him and the assignment of new business in accordance with an order previously agreed to

by Judge Chandler, the case had become moot since there was nothing more to argue about. To this Memorandum Judge Chandler filed a reply on February 25, 1966, contesting the suggestion that he had acquiesced in the Council's actions. Judge Chandler argued that his acquiescence in the division of new business settled upon by his fellow district judges was given deliberately for reasons of "strategy" in order to prevent any possibility that the Council could find that "the district judges . . . are unable to agree upon the adoption of rules or orders" for the distribution of business and assignment of cases under 28 U. S. C. § 137.

A Supplemental Memorandum filed by the Solicitor General on behalf of the Council expressed the latter's position that Judge Chandler should dispose of his pending docket of pre-December 28, 1965, cases before seeking assignment of new cases. In view of Judge Chandler's expressed disagreement with the February 4 Order the Solicitor General withdrew the suggestion of mootness. Later in March 1966 Judge Chandler submitted a reply to that Supplemental Memorandum asserting that the Council was continuing to act beyond its authority by purporting to require that he certify to it his subsequent willingness and ability to undertake new business. He contended that the Supplemental Memorandum setting forth the condition that he must apply for assignment was in effect a new order fixing still another condition on the exercise of his judicial office.

On July 12, 1967, the Judicial Council convened and, in light of a report from the District Judges of the Western District showing that Judge Chandler had only 12 cases then pending, concluded that a modification of the Order of February 4, 1966, might be in order. The Council transmitted a copy of the minutes of the meeting to the District Judges and asked them to consider anew and agree upon a division of business within

the Western District. On August 28, 1967, Judge Chandler wrote his district judge colleagues claiming that the Council's action of July 12 was but another "illegal effort" to create a situation in which the Council could assert its powers under 28 U. S. C. § 137 to assign and apportion cases.

On September 1, 1967, the Western District Judges, including Judge Chandler, advised the Judicial Council that "the current order for the division of business in this district *is agreeable* under the circumstances." (Emphasis added.) When the Council convened two weeks later, it noted the letter expressing agreement and concluded that there need be no new order in the case; accordingly the Order of February 4 was left in effect. All of these developments were reported to the Clerk of this Court and are part of the record.

2

In essence petitioner challenges all orders of the Judicial Council relating to assignment of cases in the Western District of Oklahoma as fixing conditions on the exercise of his constitutional powers as a judge. Specifically, petitioner urges that the Council has usurped the impeachment power, committed by the Constitution to the Congress exclusively. While conceding that the statute here invoked confers some powers to the Judicial Council, petitioner contends that the legitimate administrative purposes to which it may be turned do not include stripping a judge of his judicial functions as he claims was done here.

The Judicial Council contends that petitioner seeks to invoke the original jurisdiction of this Court in a case to which such jurisdiction does not extend. The Council argues that the purely administrative action taken in this case has never been reviewed by any court and cannot now be reviewed in an original proceeding under the guise of a claim under the All Writs Act.

The Judicial Council also contends that the Order of December 13, 1965, has been altogether superseded by the Order of February 4, 1966. The latter, in accordance with petitioner's desire, gave back those cases which had been temporarily withdrawn from Judge Chandler. It also continued in force the assignment and division of judicial business agreed upon by the District Judges including Judge Chandler. Alternatively, the Council contends that even absent petitioner's agreement on the division of cases, nonetheless the Council's action is authorized by 28 U. S. C. §§ 137 and 332.

The Solicitor General, who has filed a brief as *amicus curiae*, contends that this Court has jurisdiction to entertain the petition for a writ of mandamus or prohibition when a Judicial Council order is directed to a District Judge because it acted as a judicial, not an administrative, tribunal for purposes of meeting the requirement that the case fall within this Court's appellate jurisdiction. The Solicitor General suggests that the Council is nothing more nor less than the Court of Appeals sitting *en banc*, and that the proceedings in the present case may be analogized to a disbarment.[5] From this the Solicitor General concludes that the case falls within the extraordinary relief available through the All Writs Act. That conclusion in turn rests on the further assumption that this Court's supervisory authority over lower courts under §§ 13 and 14 of the First Judiciary Act was not withdrawn when the latter two sections were repealed in favor of the All Writs Act by the revision of the Judicial Code in 1948. The Solicitor General concludes,

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[5] We note that nothing in the statute or its legislative history indicates that Congress intended or that anyone considered the Circuit Judicial Councils as being courts of appeals *en banc*. Moreover, it should be noted that proposals to include a District Judge as a member of each Circuit Judicial Council have been made; obviously, a council so constituted could hardly be equated to an *en banc* court.

however, that even though there is appellate jurisdiction in this Court, nonetheless it ought not to be exercised since the Order of December 13 has been superseded for four years by the Order of February 4, the terms of which have been expressly approved by petitioner. The respondent Council also urges this point.

3

Whether the action taken by the Council with respect to the division of business in Judge Chandler's district falls to one side or the other of the line defining the maximum permissible intervention consistent with the constitutional requirement of judicial independence is the ultimate question on which review is sought in the petition now before us. The dissenting view of this case seems to be that the action of the Judicial Council relating to assignment of cases is an impingement on judicial independence. There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function. But it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business. The question is whether Congress can vest in the Judicial Council power to enforce reasonable standards as to when and where court shall be held, how long a case may be delayed in decision, whether a given case is to be tried, and many other routine matters. As to these things—and indeed an almost infinite variety of others of an administrative nature—can each judge be an absolute monarch and yet have a complex judicial system function efficiently?

The legislative history of 28 U. S. C. § 332 and related statutes is clear that some management power was both needed and granted.[6] That is precisely what a group of

[6] Congress, by its use of the mandatory "shall" in § 332, appears to have intended that district judges carry out administrative

distinguished chief judges and others seem to have had in mind when, in 1939, Congress was urged by Chief Justice Hughes, Chief Judge Groner, Judges Parker, Stephens, Biggs and others, to give judges a statutory framework and power whereby they might "put their own house in order."

Many courts—including federal courts—have informal, unpublished rules which, for example, provide that when a judge has a given number of cases under submission, he will not be assigned more cases until opinions and orders issue on his "backlog." These are reasonable, proper, and necessary rules, and the need for enforcement cannot reasonably be doubted. These internal rules do not come to public notice simply because reasonable judges acknowledge their necessity and abide their intent. But if one judge in any system refuses to abide such reasonable procedures it can hardly be that the extraordinary machinery of impeachment is the only recourse.

These questions have long been discussed and debated; they are not easy questions and the risks suggested by the dissents are not to be lightly cast aside. But for the reasons which follow we do not find it necessary to answer them because the threshold question in this case is whether we have jurisdiction to entertain the petition for extraordinary relief.

The authority of this Court to issue a writ of prohibition or mandamus "can be constitutionally exercised only insofar as such writs are in aid of its appellate

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directives of the judicial councils. Congress did not spell out procedures for giving coercive effect to council orders, and the legislative history sheds no light on whether Congress intended this statute to be implemented by regulations. Standing alone, § 332 is not a model of clarity in terms of the scope of the judicial councils' powers or the procedures to give effect to the final sentence of § 332. Legislative clarification of enforcement provisions of this statute, and definition of review of council orders is called for.

jurisdiction. *Marbury* v. *Madison*, 1 Cranch (U. S.) 137, 173–180." *Ex parte Peru*, 318 U. S. 578, 582 (1943). If the challenged action of the Judicial Council was a judicial act or decision by a judicial tribunal,[7] then perhaps it could be reviewed by this Court without doing violence to the constitutional requirement that such review be appellate. As the concurring and dissenting opinions amply demonstrate, finding the prerequisites to support a conclusion that we do have appellate jurisdiction in this case would be no mean feat. It is an exercise we decline to perform since we conclude that in the present posture of the case other avenues of relief on the merits may yet be open to Judge Chandler. See *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568–575 (1947).

Judge Chandler contends that his acquiescence in the division of business agreed upon by his fellow judges was given under some kind of duress flowing from the Council's Order of December 13, and that it was also given as a matter of "strategy," specifically in order to avoid the appearance of an absence of agreement among the District Judges as to a division of work. By so doing he sought to avoid creating a situation in which the Council would undoubtedly have had jurisdiction under § 137. The Council, however, noting that the judges had been unable to reach agreement as to those cases previously assigned to Judge Chandler, found nonetheless that a

[7] We find nothing in the legislative history to suggest that the Judicial Council was intended to be anything other than an administrative body functioning in a very limited area in a narrow sense as a "board of directors" for the circuit. Whether that characterization is valid or not, we find no indication that Congress intended to or did vest traditional judicial powers in the Councils. We see no constitutional obstacle preventing Congress from vesting in the Circuit Judicial Councils, as administrative bodies, authority to make "all necessary orders for the effective and expeditious administration of the business of the courts within [each] circuit."

disagreement existed. Despite his apparent acquiescence, Judge Chandler contends that his actions since then belie his words; specifically that his subsequent attack in this Court established his disagreement.

Whatever the merits of this apparent attempt to have it both ways, one thing is clear: except for the effort to seek the aid of this Court, Judge Chandler has never once since giving his written acquiescence in the division of business sought any relief from either the Council or some other tribunal.[8] Were he to disagree with the present division of business, the Judicial Council would thereupon be obliged to "make the necessary orders." 28 U. S. C. § 137. He chose to avoid that course. As MR. JUSTICE HARLAN's concurring opinion points out, Judge Chandler apparently desires to have the *status quo ante* restored without the bother of either disagreeing with the present order of the Council or persuading his fellow district judges to enter another. To say the least this is a remarkable litigation posture for a lawyer to assert in his own behalf.

Instead Judge Chandler brought an immediate challenge in this Court to the Order of December 13. As noted above, *supra*, p. 5, we denied any relief on the ground that that Order was "entirely interlocutory in character pending prompt further proceedings . . . and that at such proceedings Judge Chandler will be permitted to appear before the Council, with counsel . . . ." He expressly refused to attend the hearing called by the Council for February 10, 1966, in response to this Court's order; in his Brief he gives as a reason that he was unwilling to "attend a hearing conducted by a body whose

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[8] We express no opinion as to whether he could, for instance, have brought an action in the nature of mandamus to compel "an officer or employee of the United States or any agency thereof to perform a duty owed . . ." to him, 28 U. S. C. § 1361, on the theory that this was agency action.

jurisdiction he challenged. . . ." [9] As a result of that refusal we have no record, no petition for relief addressed to any agency, court or tribunal of any kind other than this Court, and a very knotty jurisdictional problem as well.[10] Parenthetically it might be noted that Chandler could have appeared, in person or by counsel, and challenged the jurisdiction of the Council without impairing his claim that it had no power in the matter.

As noted above, and as conceded by the dissents, the Order of December 13, 1965, was terminated by the Order of February 4, 1966. Judge Chandler has twice expressed agreement with the disposition of judicial business effected by that latter Order. Nothing in this record suggests that, were he to express disagreement, relief would not be forthcoming. On the contrary, on July 12, 1967, the Council expressly invited the judges of Chandler's district to agree among themselves upon a new rule or order for the division of business, and all the judges wrote back advising the Council that "the current order for the division of business in this district is agreeable under the circumstances."

Whether the Council's action was administrative action not reviewable in this Court, or whether it is reviewable here, plainly petitioner has not made a case for the extraordinary relief of mandamus or prohibition. The motion for leave to file the petition is therefore

*Denied.*

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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[9] Petitioner's Brief, p. 7.

[10] Although it is not necessary to reach or decide the issue, the action of the Judicial Council here complained of has few of the characteristics of traditional judicial action and much of what we think of as administrative action. Nor are we called upon to decide whether administrative action is reviewable when it deals only with the internal operation of a court. See nn. 6, 7, *supra*.

# SUPREME COURT OF THE UNITED STATES

No. 2, Misc.—October Term, 1969

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| Stephen S. Chandler, United States District Judge for the Western District of Oklahoma, Petitioner,<br>*v.*<br>Judicial Council of the Tenth Circuit of the United States. | On Motion for Leave to File Petition for Writ of Prohibition and/or Mandamus. |

[June 1, 1970]

Mr. Justice Harlan, concurring in the denial of an Extraordinary Writ.

This opinion sets forth my reasons for concluding (1) that the subsisting Order of the Judicial Council of February 4, 1966, presents issues which are adequately presented to this Court and should be faced by it; (2) that this Court does have jurisdiction to pass upon them; and (3) that promulgation and effectuation of the Order of February 4, 1966, are within the Council's authority, and hence this petition for an extraordinary writ should be denied. The novelty and unusual character of these questions require, regrettably, an opinion of some length.

I

I am perplexed by the Court's explanation for its failure to reach the issues presented by Judge Chandler's petition. As the Court states, the issues are whether this Court has jurisdiction to review the orders of the Judicial Council, and, if so, whether those orders are invalid because beyond the statutory and constitutional bounds of the Council's authority. The Court says, cor-

rectly I believe, that "the threshold question in this case is whether we have jurisdiction to entertain the petition for extraordinary relief." *Ante,* at 11–12. However, that question is never decided, and the Court's opinion closes with the statement that whether or not we have jurisdiction, "plainly petitioner has not made a case for the extraordinary relief of mandamus or prohibition." The predicate for this conclusion appears to be that Judge Chandler has an adequate remedy available before the Council, which he must invoke before seeking relief here. As authority for this unusual disposition, the Court cites only *Rescue Army* v. *Municipal Court,* 331 U. S. 550 (1947), a decision that I do not consider lends itself to the gloss the Court today places upon it.

It is clear that, although the Council's Order of December 13, 1965, has been revoked, the subsequent Order of February 4, 1966, is still outstanding and is attacked by Judge Chandler as beyond the authority constitutionally exercisable by the Council under either § 137 or § 332 of the Judicial Code. Judge Chandler has twice certified to the Council his acquiescence in the allocation of business mandated by the February 4 Order; indeed, his first certification was relied upon by the then Solicitor General, appearing for the Council in February 1966, as a basis for suggesting that the case was moot. Judge Chandler immediately responded that he did not in any way concede the Council's power to enter the February 4 Order, and that his indication of acquiescence made to the Council did not constitute such a concession. In light of this continued challenge to the order, the Solicitor General in March 1966 agreed "that the case can no longer be deemed moot."

The case thus reached the posture in which it now stands: Judge Chandler unequivocally asserts that the February 4 Order is beyond the Council's authority. If his contention were sound, the only validly outstanding

directives for the allocation of business in the District Court would be those "rules and orders" of that court, issued under § 137, that were in effect prior to December 13, 1965. Though the terms of those rules and orders are not before us, it is evident that they provided for assignment to Judge Chandler of a portion of the cases continually filed in his court. In challenging the validity of the Council's attempts to modify the previous allocation of business, and in requesting restoration of the *status quo ante,* Judge Chandler seeks to achieve a marked departure from the manner in which business is currently allocated.

Judge Chandler claims a right to accomplish this result *without* the necessity of mobilizing all the judges of his district to change the assignment of business by unanimous action, as the February 4 Order allows them to do. Further, since he denies the Council's authority to deprive him of all new business, he of course denies that he should be required to request the Council to renege as a condition of obtaining review of its outstanding order. He claims that it is illegal for the Council to deprive him of new cases, and equally so for the Council to condition his access to new cases upon his making a request to it in the form of a certification of disagreement under § 137.

Although the Court states that it does not decide the merits of this claim, see *ante,* at 13, I can read its opinion only as a determination that the claim is insubstantial. The Court states that it is a "remarkable litigation posture" for Judge Chandler to argue that the Council has no authority to force him to choose between remaining without new business, seeking further action by the Council, or seeking unanimous action by the District Judges. The Court denies relief because "[n]othing in this record suggests that, were he to express disagreement, relief would not be forthcoming," a decision that can only be

premised on a holding that he is denied no rights by being relegated to that course of action. *Ante,* at 13, 14. But this is the contrary of what Judge Chandler contends, and a conclusion with which two members of this Court sharply differ. As explained in Part III, *infra,* I too believe that Judge Chandler now lacks meritorious ground for complaint. However, I do not believe that the Court can properly make that holding without first determining its jurisdiction to consider the question.

*Rescue Army* provides no authority for such a procedure. That decision represents one branch of the long-settled doctrine that this Court will not determine constitutional questions unnecessarily or in a case that does not present them with sufficient clarity to make possible the circumspect consideration they require. See generally *id.,* at 568–585; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 346 (1936) (Brandeis, J., concurring). Because the constitutional issues in *Rescue Army* were presented in a highly abstract and speculative form, and were clouded by factors not present in this case,[1] the Court dismissed the appeal, declining to adju-

[1] The appeal in *Rescue Army* involved review of a state prohibition proceeding in which the appellant challenged, before trial, the complex state statutory scheme under which he had been criminally charged. The Court observed that the meanings of the various statutory provisions, and their relationships to one another, were left undefined by the ambiguous opinion of the State Supreme Court; and since the attack was on the face of the statutes, the Court found it unclear which statutes were being challenged and even what the charges were against the appellant. In contrast, the present case involves two brief federal enactments that are challenged, not on their face, but as applied by specific orders of the Council relating to Judge Chandler.

The Court states that because the scheduled hearing below was canceled, "we have no record, no petition for relief addressed to any agency, court or tribunal of any kind other than this Court, and a very knotty jurisdictional problem as well." We do, however, have a record, consisting primarily of the several orders of the

dicate them. It concluded that the appellant there, faced with state criminal charges, would have to undergo a trial on the charges before obtaining review in this Court of his constitutional claims. As in this case, the Court's action had the effect of rejecting the appellant's claim of a right to obtain relief without further proceedings in a lower tribunal, see 331 U. S., at 584. However, the Court made that disposition only *after* carefully determining that it had jurisdiction in the case. See *id.*, at 565–568.

The Court does suggest, by footnote, an alternative basis for its refusal to consider Judge Chandler's petition. *Ante*, at 13, n. 8. If an adequate means of review of Council orders were available in the Federal District Court under 28 U. S. C. § 1361, that might justify this Court's staying its hand until such review had been sought. However, as pointed out by the United States as *amicus curiae*, it seems wholly unrealistic to suggest

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Council and the minutes of the meetings at which it dealt with this matter. The Council's February 4 Order, unlike that of December 13, which was "entirely interlocutory," effects a change of indefinite duration in the allocation of District Court business. It was incumbent on the Council to take such action only on a record that would support it; if the record fails to support the Council's action, that does not obfuscate Judge Chandler's claims but strengthens them. His claims for the most part do not depend on his establishing from the record the existence of particular factual circumstances, cf. *De Backer* v. *Brainard*, 396 U. S. 28 (1969), but on the alleged lack of possible justification in the record for the Council's action. Nothing in *Rescue Army* seems to justify a refusal to adjudicate the issue thus presented. I find that the February 4 Order is justified on the record in this case, see Part III, *infra*.

The significance of Judge Chandler's failure to seek review in a tribunal other than this Court depends, of course, on the resolution of the "knotty jurisdictional question" presented by his petition to this Court. I fail to see how it justifies not reaching that question at all.

that an appropriate remedy could be obtained from a District Court. The District Court mandamus statute, § 1361, extends to "officers," "employees," and "agencies" of the United States; there is no indication that it empowers the District Courts to issue mandamus to other judicial tribunals. Thus, as the Judicial Council seems to concede, the availability of a remedy under that statute hinges on a determination, which the Court avoids making, whether the Council's actions under review were judicial or not. Brief for Respondent 19. Beyond that, direct review by a district judge of the actions of circuit judges would present serious incongruities and practical problems certainly not contemplated when § 1361 was enacted. It is unrealistic for the Court to imply that § 1361 presents an appropriate avenue of relief justifying this Court's refusal to exercise its jurisdiction.

I do not disagree with the Court that the issues presented by Judge Chandler's petition are troublesome ones that we might wish to avoid deciding. However, I can perceive no reasoned justification for the Court's refusal to decide them. Chief Justice Marshall long ago enunciated the principle that should govern us here:

> "It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens* v. *Virginia*, 19 U. S. 264, 404 (1821).

That principle has not been abrogated by the *Rescue Army* decision, which merely undertook to define the limits of our ability to adjudicate constitutional issues in cases that adequately present them. I find no license in that decision for the action taken by the Court today.

## II

Before Judge Chandler's attack on the orders of the Judicial Council can be considered, it must be determined whether the Court possesses jurisdiction to entertain his petition for a writ of mandamus or prohibition. While I agree with my Brothers BLACK and DOUGLAS that the Court does have jurisdiction, I think that the question warrants fuller treatment than they have given it.

### A. CONSTITUTIONAL JURISDICTION

Any discussion of the scope of this Court's authority under the Constitution must take as its point of departure *Marbury* v. *Madison*, 5 U. S. 137 (1803), where the Court held that except in those instances specifically enumerated in Article III of the Constitution,[2] this Court may exercise only appellate—not original—jurisdiction. Because this suit is not cognizable as an original cause, the question initially to be faced is whether it is within our appellate jurisdiction.

The Court was asked in *Marbury* to issue a writ of mandamus to compel the Secretary of State to deliver to an appointed justice of the peace his previously signed commission. After noting that the suit did not fall within any of the enumerated heads of original jurisdiction, the Court, through Chief Justice Marshall, concluded: "To enable this court, then, to issue a *mandamus*, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable [the Court] to exercise appellate jurisdiction." *Id.*, at 175. The Court held that issuance of mandamus to a nonjudicial federal officer would not be an exercise of appellate, but of original,

[2] "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction." U. S. Const. Art. III, § 2, cl. 2.

jurisdiction. Thus the statute that purported to authorize such action by the Supreme Court was ineffective. See 2 Story, Commentaries on the Constitution of the United States § 1761 (5th ed. 1891).

The Chief Justice stated, as the "essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." *Ibid.* Beyond cavil, the issuance of a writ of mandamus to an inferior *court* is an exercise of appellate jurisdiction. *In re Winn*, 213 U. S. 458, 465–466 (1809). If the challenged orders of the Judicial Council in this instance were "an exercise of judicial power," this Court is constitutionally vested with jurisdiction to review them, absent any statute curtailing such review. *Williams* v. *United States*, 289 U. S. 553, 566 (1933); *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 723 (1929); *In re Sanborn*, 148 U. S. 222, 224 (1893). On the other hand, if they were not, *Marbury* alone is sufficient authority to support a conclusion that this suit is beyond this Court's power under Article III. An analysis of the nature of the Council's orders must begin with consideration of the statute by which the Council was created.

The Judicial Councils of the circuits were brought into being by the Act of August 7, 1939, which was termed "An act to provide for the administration of the United States courts, and for other purposes." C. 501, § 1, 53 Stat. 1223. The major purposes of the Act were to free the federal courts from their previous reliance on the Justice Department in budgetary matters, and "to furnish to the Federal courts the administrative machinery for self-improvement, through which those courts will be able to scrutinize their own work and develop efficiency and promptness in their administration of justice." H. R. Rep. No. 702, 76th Cong., 1st Sess., 2 (1939). To this end the Act established the Administrative Office

of the United States Courts, headed by a Director, to compile statistical data on the operation of the courts and to provide support services of a logistical nature.[3] The Act further established two new entities in each of the judicial circuits: the Judicial Council, composed of all the active circuit judges, and the Judicial Conference, composed of circuit and district judges along with participating members of the bar. The Council, in regular meetings, was to consider the reports of the Director and take "such action . . . thereon" as might be necessary;[4] the Conference was to meet annually "for the purpose of considering the state of the business of the courts and advising ways and means of improving the administation of justice within the circuit."[5]

As these statutory provisions indicate, Congress envisioned quite different functions for the three new bodies. The role of the Administrative Office, and its Director, was to be "administrative" in the narrowest sense of that term. The Director was entrusted with no authority over the performance of judicial business—his role with respect to such business was, and is, merely to collect information for use by the courts themselves. Chief Justice Groner of the Court of Appeals for the District of Columbia, who was chairman of the committee of circuit judges that participated in drafting the bill, stressed to the Senate Committee on the Judiciary that the bill would give the Director no "supervision or control over the exercise of purely judicial duties," because to grant such power to an administrative officer "would be to destroy the very fundamentals of our theory of government. The administrative officer [the Director] proposed by this bill is purely an administrative

[3] C. 501, § 1, 53 Stat. 1223, as amended, 28 U. S. C. §§ 601, 604.
[4] C. 501, § 1, 53 Stat. 1223, 1224, as amended, 28 U. S. C. § 332.
[5] C. 501, § 1, 53 Stat. 1223, 1224–1225, as amended, 28 U. S. C. § 333.

officer." Hearings on S. 188 Before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 1st Sess., 12 (1939) (response to question by Senator Hatch). See also *id.*, at 36 (statement of A. Holtzoff).

The Judicial Conference for each circuit was given a complementary role, again divorced from direct involvement in the disposition by the courts of their judicial business. Patterned in large part after the voluntary conferences that had been held for years in the Fourth Circuit, the Conference was intended to provide an opportunity for friendly interchange among judges and between bench and bar, out of which might grow increased understanding of problems of judicial administration and enhanced cooperation toward their solution. Its function, as indicated by the statutory language quoted above, was to be "purely advisory." See Hearings on H. R. 5999 before the House Committee on the Judiciary, 76th Cong., 1st Sess., 11–12, 17, 23–24 (1939).

The Judicial Council, on the other hand, was designed as an actual participant in the management of the judicial work of the circuit. The Act provided that, "[t]o the end that the work of the district courts shall be effectively and expeditiously transacted," the circuit judges of each circuit were to meet as a council at least twice a year. After consideration of the statistical reports submitted by the Administrative Office, "such action shall be taken thereon by the council as may be necessary. It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts."[6] This provision exists today as § 332 without

[6] This provision stated in full:

"To the end that the work of the district courts shall be effectively and expeditiously transacted, it shall be the duty of the senior circuit judge of each circuit to call at such time and place as he shall designate, but at least twice in each year, a council

relevant change, except that the 1948 revision of the Judicial Code added a declaration that "[e]ach judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit," and correspondingly directed the district judges to carry out all such "orders." The reviser's note explained this amendment as merely a change in "phraseology," embodying in new words the original understanding of the powers of the councils. H. R. Rep. No. 308, 80th Cong., 1st Sess., A 46 (1947).

The most helpful guide to determining the role envisaged for the Judicial Councils is the testimony of Chief Justice Groner, who shouldered most of the task of explaining the purposes of the bill to the committees of both houses of Congress. He explained that under existing law the circuit judges had "no authority to require a district judge to speed up his work or to admonish him that he is not bearing the full and fair burden that he is expected to bear, or to take action as to any other matter which is the subject of criticism, for which he may be responsible." Hearings on S. 188, *supra*, at 11. In contrast, under the proposed bill the Administrative Office would "observe and see that whatever is wrong in the administration of justice, from whatever sources it

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composed of the circuit judges for such circuit, who are hereby designated a council for that purpose, at which council the senior circuit judge shall preside. The senior judge shall submit to the council the quarterly reports of the Director required to be filed by the provisions of section 304, clause (2) [now 28 U. S. C. § 604 (a) (2)], and such action shall be taken thereon by the council as may be necessary. It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts. Nothing contained in this section shall affect the provisions of existing law relating to the assignment of district judges to serve outside of the districts for which they, respectively, were appointed." C. 501, § 1, 53 Stat. 1224.

may arise, is brought to the attention of the judicial council that it may be corrected, by the courts themselves." *Id.*, at 12.

As examples of the kinds of action a Judicial Council might be expected to take under the proposed bill, Chief Justice Groner suggested that if the statistics showed a particular district court to be falling behind in its work, the Council would "see to it, either that the particular judge who is behind in his work catches up with his work, or that assistance is given to him whereby the work may be made current." *Id.*, at 11. If it appeared that a particular judge "had been sick for 4 or 5 months and had been unable to hold any court, or had been unable, by reason of one thing or another, to transact any business, . . . immediate action could be taken to correct that situation." Hearings on H. R. 5999, *supra*, at 11. Asked by Representative Walter Chandler "what power is given there to require a judge to decide a case that he has had under advisement for months and years," he responded that the Council, after considering the matter, could issue directions that would be "final." *Id.*, at 13. Any "lazy judge's work would be reported to the council, [which] would take the correct action." *Id.*, at 27.[7]

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[7] The testimony of Chief Judge Parker of the Fourth Circuit was to the same effect. He explained:

"The importance of the bill, to my mind, is in unifying the administration of justice in the hands of the chief judicial officers of the courts, and clothing them with responsibility for the exercise of that power.

. . . . . .

"Now, with your knowledge of human nature, you can understand it is one thing for me, as the senior circuit judge, to say to Judge Jones, 'The work is getting behind in your district. You have a number of cases that ought to be decided. I think you should decide them.' That is a very different thing from a council of all of the judges of the circuit saying, 'Judge Jones, you are

Chief Judge Parker stated his view that

> "what we have done is this, up to this point: We have given to the Circuit Courts of Appeals supervisory power over the decisions of the district judges, but we have given them no power whatever over administration by the district judges.
>
> "If Judge Jones decides a case contrary to the views of the majority of the Circuit Court of Appeals, we can tell him so and reverse him. But if he holds a case under advisement for 2 years, instead of deciding it promptly, there is nothing that we are authorized by the law to do about it in the absence of an application for mandamus. Now, this [bill] authorizes us to do something about it; and I agree with you that something ought to be done about it." *Id.*, at 21.

In place of the inadequate extraordinary remedy of mandamus, which could correct only the extreme abuse in a particular case, the circuit judges, sitting as the Judicial Council, were given the authority for continuous supervision of the flow of work through the district courts.

In short, the proposed Judicial Council was intended to fill the hiatus of authority that existed under the then current arrangements, whereby the Attorney Gen-

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behind with your work and we think that the cases that you have under advisement ought to be decided, and we direct that they be decided, and we will send Judge Smith into your district and he will assist you in holding court in your district until this arrearage is cleared up.'

. . . . .

"In other words, you would have a man speaking with authority of law and not merely exercising his personal and persuasive influence.

"I think that the provision for a council is one of the best provisions in the bill, and will give the circuit judges the power to utilize the judicial man power on each circuit to the best advantage." *Id.*, at 21.

eral collected data about the operation of the courts but had no power to take corrective action, "except, perhaps, as a result of the moral suasion of his office." The proposed bill would allow compilation of more complete information, and would "provide a method, a legitimate, valid, legal method, by which, if necessary, and when necessary, the courts may clean their own house"; it would "give a body, in which the authority is firmly lodged, the power to do that and to do it expeditiously." *Id.*, at 8. See generally Report on the Powers and Responsibilities of the Judicial Councils, H. R. Doc. No. 201, 87th Cong., 1st Sess. (1961); Fish, The Circuit Councils: Rusty Hinges of Federal Judicial Administration, 37 U. Chi. L. Rev. 203 (1970).

This legislative history lends support to a conclusion that, at least in the issuance of orders to district judges to regulate the exercise of their official duties, the Judicial Council acts as a judicial tribunal for purposes of this Court's appellate jurisdiction under Article III. It seems clear that the sponsors of the bill considered the power to give such orders something that could not be entrusted to any purely "administrative" agency—not even to the Administrative Office, which was to be an arm of the judicial branch of government and under the direct control of the Supreme Court and the Judicial Conference of the United States. Chief Justice Groner, in the passage quoted above, stated that to give such power to an administrative agency "would be to destroy the very fundamentals of our theory of government." Instead, any problems unearthed by the Director's studies were to be "corrected by the courts themselves." Hearings on S. 188, *supra*, at 12. See also Hearings on H. R. 5999, *supra*, at 8.

There were further references throughout the hearings and committee reports to the fact that the corrective power would be exercised by the courts themselves. *E. g.*, Hearings on S. 188, *supra*, at 16 (statement of

A. Vanderbilt); *id.*, at 31–32 (statement of Hon. Harold M. Stephens); *id.*, at 36 (statement of A. Holtzoff); H. R. Rep. No. 702, 76th Cong., 1st Sess., 4 (1939). The House report quoted with approval an endorsement of the bill by the American Judicature Society, stating that "there is no way to fortify judicial independence equal to that of enabling the judges to perform their work under judicial supervision." *Ibid.* These statements indicate that the power to direct trial judges in the execution of their decision-making duties was regarded as a judicial power, one to be entrusted only to a judicial body.

In this regard it is important to note that an earlier draft of the 1939 Act would have given responsibility for supervising the lower courts to the Supreme Court and the Chief Justice of the United States. The idea of devolving the authority to councils at the circuit level was suggested by Chief Justice Hughes, who believed that the supervision could be made most effective by "concentration of responsibility in the various circuits, with power and authority to make the supervision all that is necessary to induce competence in the work of all the judges of the various districts within the circuit." H. R. Doc. No. 201, *supra*, at 3. It is equally notable that, while the draftsmen did consider giving district judges some representation on the Councils, see *id.*, *at* 4–5, there was apparently no thought given to including nonjudicial officers. These indications leave no doubt that the Councils' architects regarded the authority granted the Councils as closely bound up with the process of judging itself.[8]

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[8] I find little guidance for our interpretive task in the fact that the terms "administration" and "administrative" were sometimes used by witnesses or Congressmen to characterize the duties of the Councils. Those terms are not talismanic; they may, in various contexts, bear a range of related meanings. Certainly the phrase "judicial administration" is often used to characterize judicial tasks

Because the legislative history shows Congress intended the Councils to act as judicial bodies in supervising the district judges, there is no need to decide

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performed by the courts as incidents to their primary function of rendering definitive adjudications of disputes. Since the legislative history as a whole indicates that Congress regarded the direction of the trial courts' handling of cases as a judicial function, I conclude that it used the term "administrative" in the sense in which the term is applied, for example, to many trial-court rulings that do not dispose of issues in a case but merely determine its course through the judicial process.

Nor do I find an obstacle to my construction of § 332 in Congress' failure to make express provision for the imposition of sanctions on a district judge who might contravene an order of the Judicial Council. When the question of sanctions was broached at the hearings, Chief Justice Groner stated:

"I doubt but what a judge could properly say 'I am not going to decide this case any sooner than I choose to decide it. It is my case, and I am conducting my court, and you have no authority, except by impeachment.'" Hearings on H. R. 5999, *supra*, at 14. At this, Representative Celler reminded the witness of the provision in the bill making it the "duty" of district judges to carry out the Council's directions. The witness replied:

"I cannot conceive of a district judge anywhere, and I do not believe there is any, but, when he is admonished by this council of judges that he must do in accordance with the report made to him a particular thing to correct what is regarded as an abuse, that he will fail to do it. If he does fail to do it, then I think there would be imposed on the council the duty of bringing the matter in some way to the attention of the only power in existence, in a matter of that kind, which could apply the correct remedy: that is, the Congress of the United States." *Ibid.*

Similarly, Judge Parker, in response to a question whether the bill would "put any restraint on the council at all," stated:

"I do not think this bill does. Of course, I assume this is true: That the council will be restrained by the inherent limitations of the situation. They would know that, if they commanded a judge to do something, unnecessarily or unwisely, he would refuse to do it, and that would probably be the end of the matter."

Representative Sumners queried: "Then you are limited by what you can do to a judge in the way of punishment?" "Absolutely,"

whether placement of this authority in a nonjudicial body would violate the constitutional separation of powers, as Chief Justice Groner seems to have believed. It is sufficient to conclude from reason and analogy that this responsibility is of such a nature that it *may* be placed in the hands of Article III judges to be exercised as a judicial function.

An order by the Council to a district judge, directing his handling of one or many cases in his court, is an integral step in the progress of those cases from initial filing to final adjudication. Like the district judge's own orders setting a time for discovery or trial, or transferring a case to another district pursuant to 28 U. S. C. § 1404 (a), such an order, even though concerned with a matter of "judicial administration," is part of the official

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replied Judge Parker. *Id.*, at 22. See also Hearings on S. 188, *supra*, at 18–19 (statement of A. Vanderbilt).

There is no need to determine in this case the correctness of these witnesses' apparent assumption that no form of discipline short of impeachment would be permissible for disobedience to an order of the Council, or of their possible assumption that such disobedience would be an impeachable offense. It seems clear that the witnesses' statements do not detract from the conclusion drawn from the rest of the legislative history, and from the language of the statute itself, that the determinations of the Judicial Council were intended to create legal duties on the part of district judges to whom they were addressed. As Judge Parker said, the Council would be "speaking with authority of law and not merely exercising [a] personal and persuasive influence." Hearings on H. R. 5999, *supra*, at 21. Even under the present statutory scheme, certain sanctions might be available in particular circumstances, such as the invalidation on appeal of orders entered by a judge in a case that had been ordered transferred from his docket. At any rate, this is only an aspect of the general problem of determining the permissible and appropriate sanctions for any kind of unlawful judicial conduct. The fact that the enforcement mechanisms are problematic does not destroy the legal nature of the Council's orders. See H. R. Doc No. 201, *supra*, at 8; cf. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227 (1937); *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249 (1933); n. 9, *infra*.

conduct of judicial business. Unlike the more common orders of the district court, the Council's orders involve supervision of a subordinate judicial officer. But in this regard they are not unlike the extraordinary writ of mandamus, which Judge Parker thought the Council's orders would supplement, or the orders entered by courts in proceedings for disbarment of an attorney. In short, the function of the Council in ordering the district judges to take certain measures related to the cases before them is, as the legislative history indicates Congress understood, judicial in nature.[9]

To support a contrary conclusion, respondent points to the language of Justice Holmes in *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226 (1908), defining a "judicial inquiry" as one that "investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist," as contrasted to legislation, which "looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power." The Court in *Prentis* held that a ratemaking

[9] For similar reasons I have little difficulty in characterizing as a "case or controversy" within the Article III judicial power a challenge to an order of the Council that regulates a district judge in the exercise of his official duties. Where, as here, the purpose and effect of the order is to restrict the judge's performance of judicial tasks, and he alleges illegal interference with the exercise of his office, his petition presents a cognizable case or controversy just as does a petition for review of the disbarment of an attorney. See Note, The Exclusiveness of the Impeachment Power Under the Constitution, 51 Harv. L. Rev. 330, 334 (1937); cf. *Ex parte Bradley*, 74 U. S. 364 (1868); *Ex parte Robinson*, 86 U. S. 505 (1874); *Ex parte Wall*, 107 U. S. 265 (1882) (mandamus to review disbarment orders of lower federal courts). If a litigant in a case before the district court considered himself aggrieved by a Council order involving his case, his complaint also would seem to raise a justiciable case or controversy, although it is not necessary to decide now in what manner he might obtain review of the order.

proceeding in the Virginia State Corporation Commission was legislative in character, despite the fact that the Commission was assumed to function as a court in performing other duties. Similarly, in *United States* v. *Ferreira*, 54 U. S. 40 (1851), this Court concluded that the act of a district judge in passing on claims under a treaty, subject to approval by the Secretary of the Treasury, was not a judicial one; the Court held that Congress, in giving this authority to judges, referred to them by their office "merely as a designation of the persons to whom the authority is confided, and the territorial limits to which it extends." *Id.*, at 47. See also *Gordon* v. *United States*, 69 U. S. 561 (1865); *In re Metzger*, 47 U. S. 176 (1847); *Hayburn's Case*, 2 U. S. 409 (1792).

Respondent argues that the functions of the Judicial Council under § 332 are, under Justice Holmes' definitions, legislative, or administrative, rather than judicial; and that the statutory provision making the membership of the Council coextensive with that of the Court of Appeals for each circuit [10] is merely a means of designating the individual members by reference to their office. Certainly respondent is correct in urging that Congress' designation of circuit judges as the members of the Council does not in itself make the Council's function judicial. I think, however, that the Council's orders directing the official business of the district courts are judicial within the general definition of that term in *Prentis*. In urging that the Council's function merely "looks to the future and changes existing conditions by making a new rule," respondent disregards the fact that each of the Council's orders, such as those challenged here, is rooted in the factual circumstances of the business of a particular judge or judges and the status of a

[10] Compare 28 U. S. C. § 332 with 28 U. S. C. § 43 (a) and Fed. Rule App. Proc. 35 (a).

particular case or cases in the District Court; and each order, if properly entered, extends only as far as the circumstances that make it "necessary . . . for the effective and expeditious administration of the business of the courts." 28 U. S. C. § 332. As noted above, the Council's orders for the handling of cases in the District Court serve as one step in the progress of those cases toward judgment. Those orders can be expected to apply commonly accepted notions of proper judicial administration to the special factual situations of particular cases or particular judges.

As respondent points out, the power entrusted to the Councils by § 332, like those added by later enactments, see p. 19, *infra*, necessarily involves a large amount of discretion: accordingly, review of the Councils' actions will usually be narrow in scope. But this does not mean that the Councils are "left at large as planning agencies." *United States* v. *First City National Bank*, 386 U. S. 361, 369–370 (1967). In *First City National Bank*, we were faced with a federal statute directing the courts to determine whether the anticompetitive effect of a proposed bank merger was outweighed by considerations of community convenience and need. We ruled that the courts could accept this as a "judicial task" because, like the "rule of reason," long prevalent in the antitrust field, the effect-on-competition standard was a familiar one within "the area of judicial competence." See also *United Steelworkers* v. *United States*, 361 U. S. 39 (1959). Judicial administration is a matter in which the courts even more clearly should have special competence. Within the framework of the statutes establishing the inferior federal courts and defining their jurisdiction, the Judicial Councils are charged with the duty to take such actions as are necessary for the expedition of the business of the courts in each circuit. Their discretion in this matter, while broad, does not seem to be of a different order from that possessed by district judges with respect

to many matters of trial administration. In both instances, review can correct legal error or abuse of discretion where it occurs; that the scope of review will often be very narrow does not in itself establish that the exercise of such discretion is a nonjudicial act.[11]

Respondent makes a further argument to avert a conclusion that the actions here drawn in question were judicial actions. It points out that Congress since 1939 has given the Judicial Councils many specific powers—powers that respondent considers so clearly nonjudicial as to negate any inference that the Council serves as a "judicial" body within the purview of Article III. Those powers include the power to order a district judge, where circumstances require, to reside in a particular part of the district for which he is appointed, 28 U. S. C. § 134 (c); to make any necessary orders if the district judges in any district are unable to agree upon the division of business among them, 28 U. S. C. § 137; to consent to the pretermission of any regular session of a District Court for insufficient business or other good cause, 28 U. S. C. § 140 (a); to approve as necessary the provision of judicial accommodations for the courts by the General Services Administration, 28 U. S. C. § 142; to consent to the designation and assignment of a circuit or district judge to sit on courts other than those for which they are appointed, 28 U. S. C. § 295; to certify to the President

[11] It should be noted that virtually all of the additional powers that have been conferred on the Councils by provisions of the Judicial Code other than § 332, see *infra*, define the Council's tasks in terms commonly used as standards for judicial determination. See 28 U. S. C. § 134 (c) ("[i]f the public interest and the nature of the business of a district court require"), § 137 ("necessary orders"), § 142 ("court quarters and accomodations . . . approved as necessary"), § 372 (b) ("judge . . . unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability"); 11 U. S. C. § 62 (b) ("[r]emoval . . . for incompetency, misconduct, or neglect of duty").

that a circuit or district judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability, thus authorizing the President to appoint an additional judge, 28 U. S. C. § 372 (b); to direct where the records of the Courts of Appeals and District Courts shall be kept, 28 U. S. C. § 457; to approve plans for furnishing representation for defendants under the Criminal Justice Act, 18 U. S. C. § 3006A (a); and to take various actions in regard to referees in bankruptcy, including removal of a referee for cause, 11 U. S. C. §§ 62 (b), 65 (a), (b), 68 (a), (b), (c), 71 (b), (c).

While many of these powers are trivial in comparison with the courts' basic responsibility for final adjudication of lawsuits, I am not persuaded that their possession is inconsistent with a conclusion that the Council, when performing its central responsibilities under 28 U. S. C. § 332, exercises judicial power granted under Article III. Cf. *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 580–582 (1962) (opinion of HARLAN, J.). In the first place, the respondent concedes that at least one of these enumerated powers—the power to remove referees for cause—"can properly be regarded as judicial," and it is not at all clear that any of them is beyond the range of the permissible activities of an Article III court. In *Textile Mills Securities Corp.* v. *Commissioner*, 314 U. S. 326, 332 (1941), the Court noted the range of relatively minor responsibilities, other than the hearing of appeals, placed by statute in the Courts of Appeals. These included prescribing the form of writs and other process and the form and style of the courts' seals; making rules and regulations; appointing a clerk and approving the appointment and removal of deputy clerks; and fixing the times when court should be held. Each of these functions was to be performed by the "court." While it is

possible that the performance of some of them might never produce a case or controversy reviewable in this Court, they are reasonably ancillary to the primary, dispute-deciding function of the Courts of Appeals. Just as the Court in *Textile Mills* did not question the authority of Congress to grant such incidental powers to the Courts of Appeals, I see little reason to believe that any of the various supervisory tasks entrusted to the Judicial Council is beyond the capacities of a judicial body under Article III.

In the second place, my conclusion about the nature of the Council's primary function under § 332 would stand even if it were determined that one or more of the Council's assorted incidental powers was incapable of being exercised by an Article III court. If I am correct in concluding that Congress' purpose in 1939 in creating the Judicial Councils was to vest in them, as an arm of the Article III judiciary, supervisory powers over the disposition of business in the district courts, that purpose is not undone by a subsequent congressional attempt to give them a minor nonjudicial task; it would be "perverse to make the status of [the Councils] turn upon so miniscule a portion of their purported functions." *Glidden Co.* v. *Zdanok*, 370 U. S., at 582–583.

### B. Statutory Jurisdiction

This Court does not, of course, necessarily possess all of the appellate jurisdiction permitted to it by Article III. That article provides that our appellate jurisdiction is to be exercised "with such exceptions and under such regulations as the Congress shall prescribe," and this language has been held to give Congress the power, within limits, to prescribe the instances in which it may be exercised. *E. g., Ex parte McCardle*, 74 U. S. 506, 512–513 (1869). I turn, therefore, to the Judicial Code

to determine our statutory authority to consider Judge Chandler's petition.

Congress in the Code has not spoken, one way or the other, regarding review of the orders of Judicial Councils. Petitioner asserts that the Court has power to issue mandamus or prohibition to the Councils under the All Writs Act, 28 U. S. C. § 1651 (a), which provides that

> "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

This statute has been construed to empower this Court to issue an extraordinary writ to a lower federal court in a case falling within our statutory appellate jurisdiction, where the issuance of the writ will further the exercise of that jurisdiction. See, *e. g., DeBeers Consolidated Mines, Ltd.* v. *United States,* 325 U. S. 212, 217 (1945); *United States Alkali Export Assn.* v. *United States,* 325 U. S. 196, 201–204 (1945). It is now settled that the case need not be already pending in this Court before an extraordinary writ may be issued under § 1651 (a); rather, the Court may issue the writ when the lower court's action might defeat or frustrate this Court's *eventual* jurisdiction, even where that jurisdiction could be invoked on the merits only after proceedings in an intermediate court. See, *e. g., DeBeers Consolidated Mines, Ltd.* v. *United States,* 325 U. S., at 217; *Ex parte Peru,* 318 U. S. 578 (1943); *Ex parte United States,* 287 U. S. 241, 248–249 (1932); *McClellan* v. *Carland,* 217 U. S. 268 (1910); cf. *FTC* v. *Dean Foods Co.,* 384 U. S. 597 (1966); *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21 (1943). But cf. *In re Glaser,* 198 U. S. 171, 173 (1905); *In re Massachusetts,* 197 U. S. 482, 488 (1905).

Each of the prior cases in which this Court has invoked § 1651 (a) to issue a writ "in aid of its jurisdiction" has involved a particular lawsuit over which the Court would have statutory review jurisdiction at a later stage. By contrast, petitioner's reliance on this statute is bottomed on the fact that the action of the Judicial Council "touches, through Judge Chandler's fate, hundreds of cases over which this Court has appellate or review jurisdiction." Petition for Prohibition or Mandamus, 3. He argues that the Council's orders, allocating to other judges in his district cases that would otherwise be decided by him, constitute a usurpation of power that cannot adequately be remedied on final review of those cases by certiorari or appeal in this Court. The United States as *amicus curiae* agrees that this claim properly invokes the Court's power to consider whether mandamus or prohibition should be granted.[12] Although this expansive use of § 1651 (a) has no direct precedent in this Court, it seems to me wholly in line with the history of that statute and consistent with the manner in which it has been interpreted both here and in the lower courts.

Chief Justice Stone, writing for the Court in *Ex parte Peru*, 318 U. S., at 583, characterized the "historic use of writs of prohibition and mandamus directed by an appellate to an inferior court" as that of "confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise its authority when

[12] Respondent Judicial Council agrees, for "substantially the reasons advanced by the Solicitor General," that § 1651 provides statutory authority for exercise of jurisdiction in this proceeding, if the proceeding is within the permissible appellate jurisdiction of this Court under Article III. Like the *amicus* United States, however, respondent notes that the question is not free from doubt. It is incumbent upon the Court to consider the question even in the absence of disagreement between the parties.

it is its duty to do so." The bounds of this Court's discretionary power to issue such writs were further stated in *Parr* v. *United States*, 351 U. S. 513, 520 (1956):

> "The power to issue them is discretionary and it is sparingly exercised. . . . This is not a case where a court has exceeded or refused to exercise its jurisdiction, see *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26, nor one where appellate review will be defeated if a writ does not issue, cf. *Maryland* v. *Soper*, 270 U. S. 9, 29–30. Here the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction. The extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals. *Roche* v. *Evaporated Milk Assn., supra*, at p. 30." [13]

In *Parr*, the petitioner's claim was simply that a district court had erred in dismissing an indictment at the Government's request after the Government had obtained a new indictment for the same offenses in another district. In contrast, the present case involves a claim that the Council's orders were entered in a matter entirely beyond its jurisdiction. Judge Chandler claims that the order of December 13, 1965, depriving him of both pending and future cases, was tantamount to his removal from office, and that such an act far exceeded the limited jurisdiction over "administrative" matters conferred on the Council by § 332. He further asserts, as explained in Part I, *supra*, that the order of February 4, 1966, exceeded the Council's jurisdiction under either § 332 or § 137. Such grave charges clearly go beyond a mere claim that the Council has "erred in ruling on matters within [its] jurisdiction." *Ibid.* Cf.

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[13] See also *Will* v. *United States*, 389 U. S. 90 (1967); *Bankers Life & Cas. Co.* v. *Holland*, 346 U. S. 379, 382–383 (1953).

*Will* v. *United States*, 389 U. S. 90, 95–96, 98 and n. 6 (1967); *Schlagenhauf* v. *Holder*, 379 U. S. 104 (1964).

Further, there seems to be no means by which Judge Chandler's challenge to the orders could be aired adequately on review of the cases to which they pertain. While the losing party in a case assigned to another district judge might conceivably argue on appeal that he is entitled to reversal because his case should have been heard by Judge Chandler, such an argument would encounter formidable obstacles. A reviewing court would have no way of determining whether a particular case filed in the District Court after the February 4 Order would, but for that order, have been assigned to Judge Chandler; nor is it clear that the error, if detectible, would in itself entitle the losing party to invalidate proceedings had before another judge. More basically, Judge Chandler is asserting an injury to himself, apart from any injuries to the parties in those cases; the parties cannot be relied upon to seek vindication of that injury. Cf. *Ex parte Fahey*, 332 U. S. 258, 260 (1947); *Ex parte Harding*, 219 U. S. 363, 372–380 (1911).

It is difficult to see how the very multiplicity of the cases affected by the Council's orders could derogate from this Court's authority under § 1651 (a) to issue an extraordinary writ in aid of its appellate jurisdiction over them. A somewhat analogous multiplicity was found to militate in favor of the issuance of mandamus in *McCullogh* v. *Cosgrave*, 309 U. S. 634 (1940), and in *Los Angeles Brush Corp.* v. *James*, 272 U. S. 701 (1927). As later explained by MR. JUSTICE BRENNAN, dissenting in *LaBuy* v. *Howes Leather Corp.*, *supra*,

> "*Los Angeles Brush Corp.* was a case where a reference [to a master] was made, not because a district judge decided that the particular circumstances of the particular case required a reference, but pursuant to an agreement among all the judges of that

> District Court always to appoint masters to hear patent cases regardless of the circumstances of particular cases." 352 U. S., at 266.

Mandamus was therefore issued in *Los Angeles Brush Corp.*, and in *McCullogh*, which involved a similar situation in the same District Court, in order to remedy a pervasive disregard of the Rules of Civil Procedure affecting numerous cases.[14]

Similarly, in *LaBuy* the Court upheld the authority of the Court of Appeals under § 1651 (a) to issue writs of mandamus compelling a district judge to rescind his referral of two antitrust cases to a master for trial. The Court found that the referral "was a clear abuse of discretion," and further noted "that the Court of Appeals has for years admonished the trial judges of the Seventh Circuit that the practice of making references 'does not commend itself' [and that it was] 'all too common in the Northern District of Illinois.'" 352 U. S., at 257–258. This factor was primary among the "exceptional circumstances" found to warrant the Court of Appeals' issuance of the writs.

In the reported case most nearly analogous to this one, the Court of Appeals for the Third Circuit issued a writ of mandamus at the behest of the United States to compel a district judge to return to the judicial office from which he had been unlawfully removed. *United States* v. *Malmin*, 272 Fed. 785 (C. A. 3d Cir. 1925). Judge Malmin, of the District Court of the Virgin Islands, had returned to the United States after the

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[14] The Court in *Los Angeles Brush Corp.* relied upon its mandamus power under § 234 of the Judicial Code of 1911, a provision that may no longer be in effect, see n. 15, *infra*. However, since the case was one that would be reviewable on certiorari at a later stage, it seems that § 262 (now carried forward in § 1651) was equally applicable. The *per curiam* opinion in *McCullogh* did not disclose the statutory basis for the ruling there.

territorial governor had purported to remove him and appoint another to his seat. Relying on § 262 of the Judicial Code of 1911, a predecessor of the All Writs Act, the court ruled that it had authority to issue the writ "in aid of" its jurisdiction; it observed that the absence of a lawfully appointed judge of the District Court affected the rights of litigants in cases reviewable in the Court of Appeals, and that "the right of the public to a properly constituted trial court from which appeals can validly lie could not be asserted or brought about in proceedings on appeal or writ of error." In those circumstances, the court deemed it "essential to the appellate jurisdiction of this court that orderly proceedings in the District Court of the Virgin Islands be restored." *Ibid.*

A dissenter in *Malmin* disagreed with the majority's conclusion that the defect could not be rectified on appeal, and urged that mandamus should not issue because it could not bind the succeeding appointee, who was not a party. In the case before us, as noted above, the ordinary appeals are not adequate to protect Judge Chandler's interest; and there is no problem of missing parties, since it is the judge himself who is complaining of illegal interference with the exercise of his office, and that complaint can be remedied fully by the issuance of a writ against respondent Judicial Council.

For these reasons I would conclude that the actions challenged by Judge Chandler sufficiently affect matters within this Court's appellate jurisdiction to bring his application for an extraordinary writ within our authority under § 1651 (a), and that his charges, if sustained, would present an appropriate occasion for the issuance of such a writ.[15]

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[15] In many of the early mandamus cases in this Court, such as *Ex parte Peru, supra*, the Court based its action on both § 234 and § 262 of the Judiciary Code of 1911, the predecessors of

## III

In the present posture of this case Judge Chandler, in my opinion, is not entitled to the relief he seeks. The Order of December 13, 1965, which prompted his recourse to this Court, has been superseded by the Order

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§ 1651 (a). The Court usually did not specify whether it relied upon § 234 or § 262, apparently considering that they furnished overlapping authority. Section 234, which derived from § 13 of the Judiciary Act of 1789, conferred upon this Court, and this Court only, "the power to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States . . . ." Section 262 provided that "[t]he Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." The former provision was construed as conferring upon this Court "a general supervisory power over the inferior courts, so far as this power was exercisable through a writ of mandamus in its historic function," enabling the Court "to exercise the essentially appellate function of reviewing and revising a judicial proceeding in a lower court by appropriate use of the common-law writ of mandamus, whether or not it had been given by Congress some other statutory appellate jurisdiction, or potential appellate jurisdiction, by way of an appeal or writ of error or otherwise." *In re Josephson*, 218 F. 2d 174, 177–178 (C. A. 1st Cir. 1954). See, *e. g.*, *Virginia* v. *Rives*, 100 U. S. 313, 323–324 (1879); *Ex parte Bradley*, 74 U. S. 364, 375–377 (1868); *Ex parte Crane*, 30 U. S. 190 (1831). In contrast, the power granted by § 262 was not an independent appellate power but merely an auxiliary power exercisable when appellate jurisdiction was granted by some other provision of law.

These two provisions were consolidated into § 1651 (a) as part of the 1948 revision of the Judicial Code. The brief Reviser's Note explained that the "revised section extends the power to issue writs in aid of jurisdiction, to all courts established by Act of Congress, thus making explicit the right to exercise powers implied from the creation of such courts." The "special provisions" of § 234 relating to the Supreme Court "were omitted as unnecessary in view of the revised section." H. R. Rep. No. 308, 80th Cong., 1st Sess. A144–

of February 4, 1966, which I am satisfied is entirely within the authority of the Council. I am wholly unable to regard the latter order either as a "removal" of Judge Chandler from judicial office, or as anything other than an effort to move along judicial traffic in the District Court. In this state of affairs, I can find no room for the constitutional argument so vigorously made by my Brothers BLACK and DOUGLAS.

A

Petitioner strenuously attacks the substance of the December 13 Order, which he claims effectively re-

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A145 (1947). Because the language of § 1651 (a) more closely resembles that of § 262, it has been speculated that Congress by enacting the revision may have withdrawn from this Court its special appellate power under § 234 to supervise proceedings in the lower federal courts without regard to whether any other statute gives the Court jurisdiction to review those proceedings. See *Labuy* v. *Howes Leather Co.*, 352 U. S. 249, 260 (1957) (BRENNAN, J., dissenting); *In re Josephson*, *supra*.

The United States as *amicus* urges the Court to rule that no such change was effected by the 1948 revision, arguing correctly that § 234 would clearly encompass the type of review Judge Chandler seeks. The United States points out, in support of such a ruling, that the Reviser's Note stated that § 1651 (a) "consolidates" the earlier provisions, "with necessary changes in phraseology"; this gave no indication that a significant change in the law was intended, and one should not lightly be inferred. I note that the Court in *Ex parte Peru*, referring to both § 234 and § 262, stated that "[u]nder the statutory provisions, the jurisdiction of this Court to issue common-law writs in aid of its appellate jurisdiction has been consistently sustained." 319 U. S., at 582-583. Its use of the expression "in aid of its appellate jurisdiction" to characterize both statutes suggests that the similar phrase in § 1651 (a) may also encompass the powers exercised by this Court under § 234. However, there is no need to decide this question here in light of the fact that the reviewability in this Court of the many cases whose allocation is determined by the Judicial Council's orders brings Judge Chandler's petition within the Court's powers as they existed under § 262.

moved him from office, as well as the procedures under which the order was issued. His substantive argument is that § 332, on which the Council relied, does not authorize the placing of restrictions upon the functioning of a district judge, even temporarily, and that if it does the statute is unconstitutional because the constitutional provisions[16] vesting in Congress authority to impeach federal officers, including judges, establish the exclusive means of inquiry into the fitness of a federal judge to perform his duties. In response the United States as *amicus* argues that the impeachment provisions should not be read as precluding legislation that would authorize supervision of federal judges by "judicial trial of the fulfillment of the condition of federal judicial tenure under Article III—that the judge maintain his 'good behavior.'" This question has been the subject of scholarly debate, and is presently before the Senate as it considers the proposed Judicial Reform Act. See Hearings on S. 1506 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. (1969). Petitioner's procedural objections to the December 13 Order relate to its issuance *ex parte*, without notice or hearing—circumstances that raise serious questions under the Due Process Clause of the Fifth Amendment.

I believe the respondent and the United States are correct in contending that these issues need not be resolved on this occasion. As explained in Part I above, the December 13 Order is no longer before us. Therefore, the only question still requiring decision is the validity of the outstanding February 4 Order under the enabling statutes.

B

The Council rested the February 4 Order on its authority under both § 137 and § 332. Considering first the

[16] See U. S. Const., Art. I, §§ 2, 3; Art. II, § 4.

Council's more general grant of authority, § 332, I think this order was substantively within the powers conferred by that provision. The order was designed to deal with the situation in Judge Chandler's court by requiring him to dispose of his backlog before notifying the Council that he is willing and able to undertake new assignments. See Supplemental Memorandum for Respondent. That the Councils might issue orders of this type was clearly contemplated by the draftsmen of § 332, and such orders seem to have been a customary measure taken by the Councils under the section.

The legislative history of § 332, summarized in Part II above, makes clear that a Judicial Council's mandate to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit" was intended to encompass the making of orders that would direct a district judge to clear up his docket or would channel cases to other judges when a situation existed with respect to one judge that was inimical to the effective administration of justice. Cf. Vinson, The Business of Judicial Administration, 35 A. B. A. J. 893, 895 (1949).

The Judicial Conference of the United States made a study in 1961 of the role of the Judicial Councils, culminating in a report that was transmitted to Congress by Chief Justice Warren. That report, after thorough consideration of the legislative history of the 1939 Act, specifically listed as among the responsibilities of the Councils "having a judge who has an accumulation of submitted cases not take on any further trial work until such cases have been decided." H. R. Doc. No. 201, *supra*, at 10. This power has been exercised on other occasions by other Judicial Councils. See, *e. g.*, Fish, *supra*, at 230; Lumbard, The Place of the Federal Judicial Councils in the Administration of the Courts, 47 A. B. A. J. 169, 170–171 (1961); Shafroth, Modern Developments in

Judicial Administration, 12 Amer. U. L. Rev. 150, 160 (1963). The propriety of such action has apparently never before been seriously challenged.

Judge Chandler argues, however, that § 332 limits the Council's authority in making this type of order to situations in which the order is necessitated by the existence of an extraordinary backlog of cases, and that the February 4 Order was prompted, not by such a backlog, but by the Council's desire to punish Judge Chandler for misbehavior. There seem to be two strands to this argument. First, there are suggestions in petitioner's briefs and in those of *amicus curiae* Shipley that the Council's actions have been taken not for the reasons stated in the various orders and minutes of the Council but for reasons of personal animosity. There is nothing in the record, which consists of Judge Chandler's petition and the orders and minutes of the Council, to substantiate this charge, and I for one am quite unwilling to attribute such motives to the Council. Second, Judge Chandler seems to assert that the February 4 Order is sustainable only if supported by a showing that his docket bore a numerically heavier load of pending cases than did those of his colleagues on the District Court, and that this justification is lacking here.[17] I believe

[17] Although neither the December 13 Order nor the February 4 Order recited figures concerning the status of the docket in the District Court, the former order did state that it was predicated on a series of meetings over a four-year period in which the Council "has discussed the business of the United States District Court for the Western District of Oklahoma and has done so with particular regard to the effect thereon of the attitude and conduct of Judge Chandler who, as the Chief Judge of that district, is primarily responsible for the administration of such business."

Approximately a year after the issuance of the February 4 Order, in the course of determining "whether the existing order was still suitable or whether the conditions had changed to an extent sufficient to dictate a change in the order," the Council examined

this argument reflects an overly restrictive view of the Judicial Council's role.

The legislative history of § 332 contains positive refutation of petitioner's argument that the only factor a Council might appropriately consider in making an order such as that of February 4 is the statistical weight of the workloads of the various district judges. It is true, as the legislative history in Part II above confirms, that abatement of delays in disposition of cases was a principal purpose for creation of the Councils; but the Councils were deliberately given broad responsibilities to meet other problems as they arose. Chief Justice Groner contemplated that the Councils would cope not only with delays but also with "any other matter which is the subject of criticism, or properly could be made the subject of criticism, for which [a district judge] may be responsible." Hearings on S. 188, *supra*, at 11. The Senate committee included this part

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statistics furnished by the Administrative Office of the United States Courts, showing that on February 1, 1966, 138 cases had been pending before Judge Chandler, as contrasted to 92, 91, and 99 cases respectively pending before the other active district judges. Further statistics showed that 50 cases were still pending before Judge Chandler on January 31, 1967. On the basis of these figures the Council determined that no action was then appropriate regarding the assignment of cases in the District Court.

On July 12, 1967, the Council again reviewed the condition of the District Court docket and, on discovering that only 12 cases were pending before Judge Chandler, determined that a revision should be made of the disposition of business mandated by the February 4 Order. It requested notification from the district judges of a new order of business suitable to them. However, as appears from the Court's opinion, the district judges advised the Council "that the current order for the division of business in this district is agreeable under the circumstances." On receiving this message the Council determined to leave the February 4 Order in effect. Subsequent statistics, submitted to the Council by the Administrative Office, showed that Judge Chandler had six cases pending on June 30, 1969.

of the testimony in its report recommending passage of the bill. S. Rep. No. 426, *supra*, at 3. The same witness later stated that the Council's responsibilities would embrace correction of "whatever is wrong in the administration of justice, from whatever sources it may arise," as a means of promoting "the strengthening of confidence on the part of the people." *Id.*, at 12–14.[18]

The broad mandate of the Councils was further stressed by the Judicial Conference in its 1961 report. The Conference considered it to be "patent" from the legislative history that § 332

> "imposed upon a judicial council the responsibility of seeing that the work and function of the courts in its circuit were expeditiously and effectively performed; and that this responsibility of observation, supervision, and correction went to the whole of a court's functioning, in both personal and institutional aspect." H. R. Doc. No. 201, *supra*, at 6.

From a study of the applications of the statute by the various Councils, the Conference concluded that

> "most of the councils appear, from the things with which they have dealt in these situations, to have recognized that their responsibilities and power extend, not merely to dealing with the questions of the handling and dispatching of a trial court's business in its technical sense, but also to dealing with the business of the judiciary in its broader or institutional sense, such as the preventing of any stigma, disrepute, or other element of loss of public confidence occurring as to the Federal courts or to the administration of justice by them, from any nature of action by an individual judge or a person attached to the courts." *Id.*, at 7.

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[18] See also Hearings on H. R. 5999, *supra*, at 16 (statement of Chief Justice Groner); *id.*, at 22 (statement of Judge Parker).

The Conference specifically approved this construction in spelling out its conclusions. *Id.*, at 8–9.

It is not necessary to define all of the limits on the powers of the Councils under § 332 in order to determine that the February 4 Order was a proper exercise of those powers. The December 13 Order noted that the Council was familiar with Judge Chandler's conduct of official business from four years of scrutiny, and it further recited that

> "[d]uring that period Judge Chandler has been a party defendant in both civil and criminal litigation. One civil case is still pending. Two proceedings have been brought in the United States Court of Appeals for the Tenth Circuit to disqualify him from handling specific litigation. In one instance he was ordered to proceed no further and the other is still pending."

I believe that these circumstances, taken as a whole, established a prima facie basis for the Council's conclusion that some action was appropriate to alleviate what the Council members perceived as a threat to public confidence in the administration of justice.

C

Passing over the now revoked action taken on December 13, I consider the February 4 Order, restricting Judge Chandler for the time being to the cases then pending before him, to be a permissible interim step toward exploration and solution of the problem presented. The Council must be presumed to have known of the substantial number of cases then available to Judge Chandler, see n. 17, *supra*, and it could reasonably conclude that a careful way to proceed would be to observe the manner in which Judge Chandler handled those cases before determining what more permanent steps

should be taken with respect to the administration of the business of the District Court.

When the Council learned that Judge Chandler had disposed of the bulk of his cases, it invited him and the other district judges to propose a new distribution of business; the district judges together, or Judge Chandler alone exercising his right under § 137 to certify a disagreement to the Council, are free to make such a proposal at any time. Judge Chandler's claim that his failure to seek a new allocation is the result of unlawful "duress" seems insubstantial in light of the initial validity of the February 4 Order. Even if the December 13 Order did impose a form of duress in January 1966, when the district judges settled upon the present division of cases, that order had been revoked, and there could hardly be said to have been duress, when the district judges declined the Council's July 1967 invitation to propose a new order. Serious questions would be presented if, after exhausting much of his pending business, Judge Chandler had sought additional business and the Council had declined without advancing substantial additional justification for the refusal. However, because of Judge Chandler's inaction, that situation is not presented on this record.

In view of my conclusion that the February 4 Order was a valid exercise of the Council's power under § 332, I need not consider the Council's alternative justification of the order under § 137, or petitioner's arguments concerning the inapplicability of that provision.

D

Finally, the procedures followed by the Council in promulgating its February 4 Order do not appear to have been offensive to Congress' conception of the manner in which the Councils would act, nor inconsistent with the basic demands of due process of law. It seems to have

been assumed throughout the consideration of the 1939 Act that, at least on relatively minor matters, the Councils would ordinarily proceed *ex parte*. See, *e. g.*, hearings on H. R. 5999, *supra*, at 14 (statement of Chief Justice Groner). Beginning with the initial suggestion by Chief Justice Hughes, one of the major reasons for placing these responsibilities in a body of circuit judges was that they would have a great deal of firsthand knowledge about the district courts and about the work and conduct of the individual district judges. See H. R. Doc. No. 201, *supra*, at 3 (Chief Justice Hughes); Hearings on S. 188, *supra*, at 16 (statement of A. Vanderbilt). The other major source of the information on which the Councils would act was to be the data gathered by the Administrative Office.

However, the statute, which uses very general language to vest heavy responsibilities in the Councils, certainly allows the Councils the flexibility to vary their procedures, adopting in a particular instance those that are especially suited to the matter at hand or necessitated by the demands of fairness. See Fish, *supra*, at 222. There is much in our tradition of due process of law that runs counter to the taking of serious action on the basis of *ex parte* assertions or suspicions of misbehavior or incapacity. Apparently recognizing this, the Council after its temporary December 13 Order scheduled a hearing on the question of assignment of cases to Judge Chandler, and invited him to appear with counsel. Cf. *Chandler* v. *Judicial Council*, 382 U. S. 1003 (1966). As explained in the opinion of the Chief Justice, this hearing was canceled when the Council learned that no judge of the District Court wished to appear. In these circumstances the Council, it seems to me, was justified in issuing the February 4 Order without further proceedings.

Petitioner challenges this conclusion in several ways. First, he argues that the order directing the hearing,

entered January 27, 1966, did not contain adequate notice of the subject matter of the hearing. That order expressly referred to the December 13 Order and to Judge Chandler's attack upon it in this Court, and declared that "this matter" would be set for a hearing at which Judge Chandler might "present such matters to the Council as he may deem fit." [19] In view of the fact that the December 13 Order had listed specific grounds on which the Council's action was based, and Judge Chandler made no request for further specification, I cannot consider his present contention well taken.

Second, petitioner states that his boycott of the hearing was based on his denial that the Council had any jurisdiction to hold it. He apparently concludes from this that the February 4 Order stands as though the Council had never scheduled a hearing at all. However, the Council had already entered the December 13 Order, which this Court had declined, at least temporarily, to disturb, and the Council's authority to proceed further was surely sufficiently evident that Judge Chandler was not entitled to remain indifferent to its order setting

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[19] The order stated, in pertinent part:

"The Council gave consideration to its December 13, 1965, order in this matter, to the proceedings in the Supreme Court entitled 'Honorable Stephen S. Chandler, etc. v. Judicial Council . . . ,' to the motion for stay filed therein by the petitioner, to the response thereto by the Solicitor General of the United States, and to the order of the Supreme Court entered on January 21, 1966. The Council noted the reference by the Supreme Court to the statement in the response of the Solicitor General that the Council contemplated prompt further proceedings and the order of the Supreme Court that the application for stay be denied pending this contemplated prompt action of the Judicial Council.

"It is ordered that this matter be set for hearing at 9:30 A. M., Thursday, February 10, 1966, in Room 5009 of the United States Courthouse at Oklahoma City, Oklahoma, when and where the Honorable Stephen S. Chandler may appear in person and with counsel and present such matters to the Council as he may deem fit."

the matter for a hearing. Finally, petitioner asserts that the proposed hearing was deficient because he was merely invited, rather than ordered, to appear. He cites no authority for this proposition, and it appears quite untenable.

Throughout Judge Chandler's briefs, and in the dissents of my Brothers BLACK and DOUGLAS, there are strong assertions of the importance of an independent federal judiciary. I fully agree that this principle holds a profoundly important place in our scheme of government. However, I can discern no incursion on that principle in the legislation creating the Judicial Councils and empowering them to supervise the work of the District Courts, in order to ensure the effective and expeditious handling of their business. The February 4 Order, entered pursuant to this statutory authority, is a supportable exercise of the Council's responsibility to oversee the administration of federal justice.

I would grant Judge Chandler's motion for leave to file his petition for a writ of prohibition or mandamus, but for the reasons stated above I am of the opinion that no such writ should issue.

# SUPREME COURT OF THE UNITED STATES

No. 2, Misc.—October Term, 1969

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| Stephen S. Chandler, United States District Judge for the Western District of Oklahoma, Petitioner,<br>*v.*<br>Judicial Council of the Tenth Circuit of the United States. | On Motion for Leave to File Petition for Writ of Prohibition and/or Mandamus. |

[June 1, 1970]

Mr. Justice Douglas, with whom Mr. Justice Black concurs, dissenting.

The Congress, which created the lower federal courts, also created a Judicial Council for each circuit composed "of the circuit judges for the circuit, in regular active service." 28 U. S. C. § 332. The Council "shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." *Ibid.* And Congress directed that "The district judges shall promptly carry into effect all orders of the judicial council." *Ibid.*

Petitioner Stephen S. Chandler, is a federal district judge of the Tenth Circuit. On December 13, 1965, the Council, composed of five judges of the Court of Appeals, entered an order that "until the further order of the Judicial Council, the Honorable Stephen S. Chandler shall take no action whatsoever in any case or proceeding now or hereafter pending in the United States District Court for the Western District of Oklahoma; that all cases and proceedings now assigned to or pending before him shall be reassigned to and among the other judges of said court; and that until the further

order of the Judicial Council no cases or proceedings filed or instituted in the United States District Court for the Western District of Oklahoma shall be assigned to him for any action whatsoever."

Petitioner filed a petition for mandamus and/or prohibition, seeking a stay of the order of the Council. The Court denied relief stating that the order was "entirely interlocutory in character pending prompt further proceedings." 382 U. S. 1003. MR. JUSTCE BLACK and I dissented. On February 4, 1966, the Council entered an order allowing petitioner to continue to sit on cases filed and assigned as of December 28, 1965; but it apportioned all subsequent cases among the remaining judges. The Council stated that its order of February 4, 1966, superseded its order of December 13, 1965. By a subsequent order the Council directed that new judicial business would not, until further order, be assigned to petitioner.

I

This case has been and continues to be the liveliest, most controversial contest involving a federal judge in modern United States history.

The order of February 4, 1966, was made by the Council on the basis of an alleged "disagreement" among the district judges on one side and Judge Chandler on the other over the reassignment of cases previously assigned to Judge Chandler on December 28, 1965. The Council authorized Judge Chandler to sit on cases assigned to him prior to December 28, 1965; and it assigned to the other district judges all cases filed after that date.

Judge Chandler on the eve of that order, January 24, 1966, agreed to acquiesce in the assignment of new cases to the other district judges. But he disagreed with any action concerning "my pending cases." As to them he

said: "There is no provision of law that grants a Judicial Council jurisdiction over cases pending before a judge in the various stages of the judicial process after valid assignment to him. I consider it my duty to continue to assert my exclusive jurisdiction over these cases, and shall do so."

Since the order of February 4, 1966, said that all cases "assigned to Judge Chandler as of December 28, 1965, shall remain assigned to him," and since Judge Chandler did not object to the later cases being assigned to others, the then Solicitor General (MR. JUSTICE MARSHALL) suggested in a memorandum that the case had become moot.

But the Solicitor General in a later memorandum filed here March 17, 1966, agreed "that the case can no longer be deemed moot" because of Judge Chandler's continuing, expressed disagreement with the order of February 4, 1966.

As noted, the original action against Judge Chandler was taken under 28 U. S. C. § 332. The action taken February 4, 1966, was under 28 U. S. C. § 137, which provides:

> "If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders."

But there was no disagreement among the district judges and no power of the Council to act under 28 U. S. C. § 137. That was precisely the strategy that Judge Chandler selected so that if the feud against him continued, it would have to be waged under 28 U. S. C. § 332. But the Council did not oblige. It recited in its order of February 4, 1966: "In the circumstances a

disagreement exists as to the division of business and the assignment of cases in the Western District of Oklahoma."

If a disagreement existed on February 4, 1966, it existed after Judge Chandler's so-called "acquiescence" which was expressed in the letter of January 24, 1966. The entire ground is thus swept out from the mootness argument. In spite of Chandler's "acquiescence" the Council considered the case a live controversy and Chandler has contested the February 4, 1966, order ever since it issued. His opposition and the continuing raging controversy led the former Solicitor General to concede that the case had not become moot. Nor does the Council, even at this late date, make any such suggestion. Nor does the present Solicitor General.

The Court holds that because Judge Chandler refused to express to the Council his disagreement with the February 4, 1966, order, he failed to exhaust a possible means for obtaining the relief he now seeks in this Court. Had he disagreed, however, he would have vested the Council with authority to act under § 137, and that was precisely what he wanted to avoid. As MR. JUSTICE HARLAN points out, the whole basis for Judge Chandler's attack is "that it is illegal for the Council to deprive him of new cases, and equally so for the Council to condition his access to new cases upon making a request to it in the form of a certification of disagreement under § 137." The Court states that by not certifying disagreement to the Council Judge Chandler is apparently attempting "to have it both ways." It seems clear, however, that the Court's opinion now allows the Council "to have it both ways"—for unless Judge Chandler certifies disagreement with the February 4, 1966, order, he is barred from relief in this Court; and if he seeks relief from the Council by disagreeing with its order, he concedes jurisdiction in the Council for

its actions under § 137. Nothing in *Rescue Army* v. *Municipal Court*, 331 U. S. 549, relied on by the Court, compels this result.

For the reasons fully stated by MR. JUSTICE HARLAN, in Part I of his opinion, the case is ripe for decision and we have no excuse for declining to decide it.

II

Our first substantial question is whether this is a "case" or "controversy" within our jurisdiction. As Chief Justice Marshall said in *Marbury* v. *Madison*, 1 Cranch 137, 175:

> "To enable this court then to issue a *mandamus*, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them [*sic*] to exercise appellate jurisdiction. . . . It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause."

The question therefore is whether a judicial council is a lower court or inferior tribunal whose decisions are reviewable in the exercise of our appellate jurisdiction. A judicial council is only the court of appeals for a named circuit sitting en banc. These councils were created to place "responsibility for judicial administration where it belongs—with the judiciary." H. R. Rep. No. 702, 76th Cong., 1st Sess., p. 4. Chief Justice Groner of the Court of Appeals for the District of Columbia, who helped draft the bill that was enacted, explained it as follows to the Senate: [1]

> "To [give the administrative officer any supervision or control over the exercise of purely judicial functions] would be to destroy the very funda-

[1] Hearings, Subcommittee of the Senate Judiciary Committee on S. 188 (April 4–5, 1939), 76th Cong., 1st Sess., 12–13.

> mentals of our theory of government. The administrative officer proposed in this bill is purely an administrative officer. . . . It is his duty to observe and see that whatever is wrong in the administration of justice, from whatever sources it may arise, *is brought to the attention of the judicial council that it may be corrected, by the courts themselves.* That is, as I respectfully suggest, as it ought to be." (Italics added.)

The Council by 28 U. S. C. § 137 is under a duty to "make the necessary orders" in case the district judges are "unable to agree upon the adoption of rules or orders for that purpose." The Council directs the district judges to carry out certain measures. That is indeed the role of a judicial entity. Only members of the Court of Appeals are members of the Council. Those sitting on the Council do not even change their hats. Expediting the flow of cases to the dockets of district judges is wholly in line with the judicial function. We stated in *Textile Mills Corp.* v. *Commissioner,* 314 U. S. 326, 332:

> "There are numerous functions of the court, as as a 'court of record, with appellate jurisdiction,' other than hearing and deciding appeals. Under the Judicial Code these embrace prescribing the form of writs and other process and the form and style of its seal (§ 122); the making of rules and regulations (§ 122); the appointment of a clerk (§ 124) and the approval of the appointment and removal of deputy clerks (§ 125); and the fixing of the 'times' when court shall be held. § 126."

Some functions performed by a Judicial Council may be "administrative." But where, as here, it moves to disqualify a judge from sitting, removing him *pro tanto* from office, it moves against the individual with all of

the sting and much of the stigma which impeachment carries. That action gives rise to a "case" or "controversy" triggered by the Council. The Council is therefore under the circumstances an inferior judicial tribunal over which we have appellate jurisdiction where a "case" or "controversy" arises. On that assumption, it is not seriously argued that mandamus is an inappropriate remedy under the All Writs Statute.[2]

The order of December 13, 1965, may have been qualified but it has not been erased. Petitioner still is disqualified to sit on incoming cases. He still carries the stigma of the brand put on him by the Council. We should remember that the cessation of illegal conduct does not make a case moot:

> "A controversy may remain to be settled in such circumstances . . . *e. g.*, a dispute over the legality of the challenged practices. . . . The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion." *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632.

III

An independent judiciary is one of this Nation's outstanding characteristics. Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge. He commonly works with other federal judges who are likewise sovereign. But neither one alone nor any number banded together can act as censor and place sanctions on him. Under the Constitution the only leverage that can be

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[2] "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U. S. C. § 1651 (a).

asserted against him is impeachment, where pursuant to a resolution passed by the House, he is tried by the Senate, sitting as a jury. Art. I, § 2 and § 3. Our tradition even bars political impeachments as evidenced by the highly partisan, but unsuccessful, effort to oust Justice Samuel Chase of this Court in 1805.[3] The Impeachment Provision of the Constitution [4] indeed provides for the removal of "Officers" of the United States," which includes judges, on "Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Art. II, § 4.

What the Judicial Council did when it ordered petitioner to "take no action whatsoever in any case or proceeding now or hereafter pending" in his court was to do what only the Court of Impeachment can do. If the business of the federal courts needs administrative oversight, the flow of cases can be regulated. Some judges work more slowly than others; some cases may take months while others take hours or days. Matters of this kind may be regulated by the assignment procedure. But there is no power under our Constitution for one group of federal judges to censor or discipline any federal judge and no power to declare him inefficient and strip him of his power to act as a judge.

The mood of some federal judges is opposed to this view and they are active to make all federal judges walk in some uniform step. What has happened to petitioner is not a rare instance; it has happened to other federal judges who have had perhaps a more liberatarian approach to the Bill of Rights than their brethren. The

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[3] See Trial of Samuel Chase, vols. 1 and 2 (1805, taken in shorthand by Samuel H. Smith and Thomas Lloyd).

[4] State procedures vary. Thus New York by its constitution provides for the removal of judges by the judiciary court, made up of judges. See *Friedman* v. *New York*, 24 N. Y. 2d 528, 301 N. Y. S. 2d 484.

result is that the non-conformist has suffered greatly at the hands of his fellow judges.

The problem is not resolved by saying that only judicial administrative matters are involved. The power to keep a particular judge from sitting on a racial case, a church-and-state case, a free-press case, a search-and-seizure case, a railroad case, an antitrust case, or a union case may have profound consequences. Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proferred defense, and the like. Lawyers recognize this when they talk about "shopping" for a judge; Senators recognize this when they are asked to give their "advice and consent" to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community.

These are subtle, imponderable factors which other judges should not be allowed to manipulate to further their own concept of the public good. That is the crucial issue at the heart of the present controversy.

All power is a heady thing as evident by the increasing efforts of groups of federal judges to act as referees over other federal judges.

On June 10, 1969, the Judicial Conference adopted resolutions for the governance of many activities of circuit judges and districts judges. Resolution I provided: [5]

> "A judge in regular active service shall not accept compensation of any kind, whether in the form of

[5] Resolution I was suspended on November 1, 1969, by the Judicial Conference pending further study, the only residue presently in force being a requirement that a judge who in any quarterly period "receives compensation for non-judicial services in a total amount exceeding $100" shall report the same to a "receiving officer" named by the Chief Justice and acting for the federal judges. In March

> loans, gifts, gratuities, honoraria or otherwise, for services hereafter performed or to be performed by him except that provided by law for the performance of his judicial duties. Provided, however, the judicial council of the circuit (or in the case of courts not part of a circuit, the judges of the court in active service) *may upon application of a judge* approve the acceptance of compensation for the performance of services other than his judicial duties *upon a determination that the services are in the public interest or are justified by exceptional circumstances and that the services will not interfere with his judicial duties.* Both the services to be performed and the compensation to be paid shall be made a matter of public record and reported to the Judicial Conference of the United States." (Italics added.)

In the Ninth Circuit, of which I am Senior Circuit Justice, this resolution was assumed to bar a federal judge from even being an executor of his own mother's estate, unless of course he got a permit from the other judges. Resolution I apparently required permits for federal judges to teach in a law school—a practice which has paid enormous professional dividends and implicates nothing but the interest and energy of the judge. Justice Joseph Story (who sat here from 1811 to 1845) would, I imagine, have been appalled if he had been told

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1970, the Judicial Conference approved procedures and forms for judges to report outside income pursuant to the Conference Resolution of November 1, 1969. The approved form requires listing of outside income received by the judge, gifts received by the judge or his immediate family in excess of $100, any knowing participation in cases in which the judge or a member of his immediate family had a financial interest in any of the named parties, and all "fiduciary positions" held by the judge, "such as trustee or executor."

that he could not write any of his many books[6] without getting permission from a group of other federal judges. And I imagine that Justice Cardozo, Judge Jerome Frank, and Judge Learned Hand would have felt the same.[7]

To obtain a permit the other judges must determine if the services are "in the public interest." Pray, how could they determine that unless they saw the lecture, or the lecture notes, or the manuscript? And whose "public interest" would control? Judges who have not been educated to the needs of ecology and of conservation? Judges who still have a "plantation" state of mind and relegate many minorities to second class citizenship? Judges who have a narrow view of freedom of expression or a broad view of Due Process? Public issues deal with a vast contrariety of views; and judges, like other people, are to be found in all parts of the spectrum. How under the Constitution can one judge's lips be sealed because of the predestined view of other judges? An easy reply is that Resolution I covered only services for "compensation." But books entail royalties; and tax-wise it is not always easy to disassociate an author from royalties. Even though they go ultimately to charity, they pass through his income tax returns.

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[6] Equity Jurisprudence (2 vols., 1836); Equity Pleadings (1838); The Conflict of Laws (1834); The Constitution of the United States (3 vols., 1833); The Law of Agency (1839); The Law of Bailments (1832); The Law of Bills of Exchange (1843); The Law of Partnership (1841); The Law of Promissory Notes (1845); A Familiar Exposition of the Constitution of the United States (1840); A Selection of Pleadings in Civil Actions (1805).

[7] Justice Cardozo: The Growth of the Law (1931); Law and Literature and Other Essays and Addresses (1931); The Nature of the Judicial Process (1921).

Judge Learned Hand: The Bill of Rights (1958).

Judge Jerome Frank: Courts on Trial—Myth and Reality in American Justice (1949); Not Guilty (1957); If Men Were Angels (1942); Fate and Freedom (1945).

It is time that an end be put to these efforts of federal judges to ride herd on other federal judges. This is a form of "hazing" having no place under the Constitution. Federal judges are entitled, like other people, to the full freedom of the First Amendment. If they break a law, they can be prosecuted. If they become corrupt or sit in cases in which they have a personal or family stake, they can be impeached by Congress. But I search the Constitution in vain for any power of surveillance which other federal judges have over those aberrations.[8] Some of the idiosyncracies may be displeasing to those who walk in more measured, conservative steps. But those idiosyncracies can be of no possible constitutional concern to other federal judges.

It is time we put an end to the monstrous practices that seem about to overtake us by vacating the orders of the Judicial Council that brand Judge Chandler as unfit to sit in oncoming cases. Only Congress can take action, unless the Constitution is amended to allow judges to censor, police, or impeach their fellow judges.

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[8] Cf. S. 1506, 91st Cong., 1st Sess., which would amend 28 U. S. C. § 101 (a) *first* by creating a Commission on Judicial Disabilities and Tenure, composed of five federal judges in active service; *second* giving it power to "undertake an investigation of the official conduct of any judge of the United States appointed to hold office under article III of the Constitution to determine whether the conduct of such judge is and has been consistent with the good behavior required by that article;" and *third* giving it authority to recommend to the Judicial Conference that he be removed from office under the following standard: "Willful misconduct in office or willful and persistent failure to perform his official duties by a judge of the United States shall constitute conduct inconsistent with the good behavior required by article III of the Constitution and shall be cause for the removal of that judge."

# SUPREME COURT OF THE UNITED STATES

No. 2, Misc.—October Term, 1969

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| Stephen S. Chandler, United States District Judge for the Western District of Oklahoma, Petitioner, *v.* Judicial Council of the Tenth Circuit of the United States. | On Motion for Leave to File Petition for Writ of prohibition and/or mandamus. |

[June 1, 1970]

Mr. Justice Black, with whom Mr. Justice Douglas joins, dissenting.

Fully concurring in the dissent of my Brother Douglas in this case, I wish to add a few words to emphasize once again [1] the gravity of the unconstitutional wrong the Court is inflicting upon United States District Judge Stephen Chandler, and more importantly on our system of government and the Constitution itself. The preparation and adoption of that great document was a turning point in the history of this country and of the world. Our Constitution gave new hopes and dreams for freedom and equal justice to citizens of this country and signaled to the suffering and oppressed people everywhere that government could be humane. One of the many factors which gave birth to these new dreams and hopes was our constitutional plan for a more independent judicial system than had ever before existed. Judges in our system were to hold their offices during "good Behaviour," their compensation was not to be "diminished during their Continuance in Office," [2] and they were to be removed only after impeachment and trial by the United States

[1] See *Chandler* v. *Judicial Council*, 382 U. S. 1003, 1004 (1966) (dissenting opinion).

[2] Art. III, § 1.

Congress. While judges, like other people, can be tried, convicted, and punished for crimes, no word, phrase, clause, sentence, or even the Constitution taken as a whole, gives any indication that any judge was ever to be partly disqualified or wholly removed from office except by the admittedly difficult method of impeachment by the House of Representatives and conviction by the entire Senate. Such was the written guarantee in our Constitution of the independence of the judiciary, and such has always been the proud boast of our people.

I am regretfully compelled in this case to say that the Court today, in my judgment, breaks faith with this grand constitutional principle. Judge Chandler, duly appointed, duly confirmed, and never impeached by the Congress, has been barred from doing his work by other judges. The real facts of this case cannot be obscured, nor the effect of the Judicial Council's decisions defended, by any technical, legalistic effort to show that one or the other of the Council's orders issued over the years is "valid." This case must be viewed for what it is—a long history of harassment of Judge Chandler by other judges who somehow feel he is "unfit" to hold office. Their efforts have been going on for at least five years and still Judge Chandler finds no relief. What is involved here is simply a blatant effort on the part of the Council through concerted action to make Judge Chandler a "second-class judge," depriving him of the full power of his office and the right to share equally with all other federal judges in the privileges and responsibilities of the Federal Judiciary. I am unable to find in our Constitution or in any statute any authority whatever for judges to arrogate to themselves and to exercise such powers. Judge Chandler, like every other federal judge including the Justices of this Court, is subject to removal from office only by the constitutionally prescribed mode of impeachment.

The wise authors of our Constitution provided for judicial independence because they were familiar with history; they knew that judges of the past—good, patriotic judges—had occasionally lost not only their offices but also sometimes their freedom and their heads because of the actions and decrees of other judges. They were determined that no such things should happen here. But it appears that the language they used and the protections they thought they had created are not sufficient to protect our judges from the contrived intricacies used by the judges of the Tenth Circuit and this Court to uphold what has happened to Judge Chandler in this case.

I fear that unless the actions taken by the Judicial Council in this case are in some way repudiated, the hope for an independent judiciary will prove to have been no more than an evanescent dream.